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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ANR PIPELINE COMPANY and
COLORADO INTERSTATE GAS COMPANY,
Petitioners,

v.

JOHN D. LAFAVER,
Secretary of the Kansas Department of Revenue, and
MARK S. BECK,
Director of the Division of Property Valuation
of the Kansas Department of Revenue,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Amendment deprives federal courts of jurisdiction over any action that challenges the lawfulness of a state's tax, even where the action names only state officers as defendants and seeks only prospective equitable relief to remedy a continuing or future violation of federal law, and even where the state courts provide no "plain, speedy and efficient" remedy of their own?

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PETITION FOR WRIT OF CERTIORARI

Petitioners ANR Pipeline Company and Colorado Interstate Gas Company respectfully request that a writ of certiorari issue to review the judgment and decision of the court of appeals in this case.

OPINIONS BELOW

The July 21, 1998 opinion of the Tenth Circuit is reported at 150 F.3d 1178. See Appendix (App.) 1a. The September 1, 1998 order of the Tenth Circuit, deny-

ing petitioners ANR Pipeline Company's and Colorado Interstate Gas Company's (collectively "pipelines") petition for rehearing with suggestion for rehearing *en banc* is not reported. See App. 111a. The order of the district court denying the respondents Lafaver and Beck's (hereafter "state tax officials") motions for dismissal is not reported. See App. 32a.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1998. Petitioners filed a timely petition for rehearing with suggestion for rehearing *en banc* on August 19, 1998. The order of the court of appeals denying rehearing was entered on September 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved in this case is the Eleventh Amendment to the United States Constitution. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The statutory provision involved in this case is the Tax Injunction Act, 28 U.S.C. § 1341. It provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

STATEMENT OF THE CASE

This case presents an issue of fundamental importance, involving the right of taxpayers to obtain access to a judicial forum for resolution of their federal law claims:

whether the Eleventh Amendment strips the federal courts of jurisdiction to entertain an *Ex parte Young* action against a state's officers whenever the basis of the action is a claim that a tax imposed by the state is unconstitutional or is otherwise inconsistent with federal law. In the decision below, the Tenth Circuit held that the Eleventh Amendment deprives the federal courts of jurisdiction over *any* action challenging the constitutionality or lawfulness of a state's tax, even where that action does not name the state as a defendant, alleges an ongoing violation of federal law, and seeks only prospective equitable relief against state officers. Indeed, the Tenth Circuit held that such actions are barred even where, as here, the requirements of the Tax Injunction Act, 28 U.S.C. § 1341, are satisfied—that is, even where the state courts provide no "plain, speedy and efficient" remedy of their own. The Tenth Circuit's decision would thus leave numerous taxpayers without recourse to either the federal or the state courts to vindicate their federal rights.

The Tenth Circuit believed this result was required by this Court's decision in *Idaho* v. *Coeur d'Alene Tribe*, 117 S. Ct. 2028 (1997), which, the court of appeals concluded, "significant[ly] narrow[ed]" the traditional *Ex parte Young* doctrine. In particular, the panel held that *Coeur d'Alene* establishes "an important new requirement on federal courts as part of the *Ex parte Young* analysis," requiring dismissal of an action whenever "the relief being sought against a state official 'implicates special sovereignty interests.'" App. 21a. On the basis of its reading of *Coeur d'Alene*, the Tenth Circuit concluded that plaintiffs' claims against Kansas' officials were barred by the Eleventh Amendment because plaintiffs' constitutional challenges to Kansas' property tax scheme constituted "a major intrusion into Kansas' special sovereignty interests." App. 29a.

The Court should grant the petition for certiorari and reverse the judgment of the court of appeals. As will be

demonstrated below, the Tenth Circuit's decision (1) conflicts with decisions of other federal courts of appeals interpreting *Coeur d'Alene*; (2) conflicts with numerous decisions of this Court and of the courts of appeals that have either squarely held, or necessarily assumed, that a taxpayer may bring an *Ex Parte Young* action to challenge the lawfulness of a state's tax; (3) renders a vital portion of an historical and significant statute of Congress—the Tax Injunction Act—an utter nullity; and (4) leaves numerous taxpayers in states covered by the Tenth Circuit without access to any court, state or federal, in which to bring an action to vindicate their federal rights. The decision below thus amply meets all of this Court's traditional criteria for certiorari review. Sup. Ct. R. 10.

Factual background. This dispute has its roots in a lawsuit brought by a number of railroads in Kansas, alleging that Kansas assessed and collected personal property taxes on 100% of the railroad's property when 80% of commercial or industrial property within the State of Kansas was not being taxed, thereby violating the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501 *et seq.* ("4-R Act"). That litigation was resolved with a consent decree that required the Kansas Division of Property Valuation to exempt 80% of the railroads' personal property from the tax roll.

Petitioners, ANR Pipeline Company and Colorado Interstate Gas Company, are interstate natural gas pipeline companies that operate in Kansas. Both pipelines and railroads are classified as public utilities under Kansas law, K.S.A. § 79-5a01, and as large generally nonresident corporations, both pipelines and railroads have historically been targets of discriminatory state property tax treatment. Even after Kansas had agreed to exempt fully 80% of the railroads' property from the Kansas tax rolls, Kansas continued to place 100% of the pipelines' property on the rolls.

Proceedings before the Kansas Board of Tax Appeals and the Kansas State Courts. Following the consent decree, which exempted much of the railroads' property from taxation, the pipelines filed an appeal of their 1990 and 1991 tax assessments with the Kansas Board of Tax Appeals ("BOTA"), arguing, *inter alia,* that the denial to pipelines of a similar exemption to that granted the railroads violated the pipelines' rights to equal protection under both the federal and state constitutions. BOTA rejected the pipelines' challenge, App. 94a, and the pipelines appealed that denial to the Kansas Supreme Court. That court upheld BOTA's decision.[1] *CIG II,* App. 56a. The Kansas Supreme Court held that the 4-R Act mandated the 80% exemption received by the railroads, and that the Act preempted Kansas' constitutional guarantees. *CIG II,* App. 69a-73a. The court did not explain how its construction of the federal statute, even if correct, resolved the pipelines' federal constitutional claims.

Just three days after the Kansas Supreme Court issued its decision in *CIG II,* this Court decided *Department of Revenue* v. *ACF Industries, Inc.,* 510 U.S. 332 (1994). *ACF Industries* held that the State of Oregon did not violate the 4-R Act by refusing to extend to railroads the same exemptions it provided to non-railroad property. 510 U.S. at 347-48.

Noting that *ACF Industries* undermined the Kansas Supreme Court's conclusion in *CIG II* that the preferential exemption obtained by the railroads was required by the 4-R Act, the pipelines petitioned the Kansas Supreme Court for rehearing of its decision in *CIG II,* which was not yet final. The Kansas Supreme Court refused to hear the pipelines' claims and denied their request for rehearing without comment, App. 112a, and this Court denied

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[1] An earlier decision of the Court of Appeals of Kansas concerning an appeal of the pipelines' 1989 tax assessment is no longer relevant to this petition. *CIG I,* App. 45a.

certiorari. See *ANR Pipeline Co.* v. *Director of Property Valuation*, 513 U.S. 917 (1994).

During the pendency of *CIG II*, the pipelines filed appeals of their 1992 and 1993 tax assessments with BOTA. The pipelines again claimed that Kansas' preferential treatment of railroads violated the pipelines' constitutional rights, and further argued that this Court's decision in *ACF Industries* effectively overruled the Kansas Supreme Court's holding in *CIG II* that the disparity in treatment was required by the 4-R Act.

In separate one-page orders, BOTA dismissed the pipelines' appeals, without holding a hearing or taking any evidence on the issue of the disparity of treatment between dence on the issue of the disparity of treatment between the railroads and the pipelines. BOTA offered only this explanation for its peremptory dismissal of the pipelines' constitutional claims: "The Kansas Supreme Court ruled that the 4-R Act only applies to railroads. The taxpayer is not a railroad, and thus is not entitled to the similar tax treatment provided by the 4-R Act." App. 105a-106a; 108a-109a. The pipelines, however, had never claimed that they were railroads, nor alleged that they were entitled to the exemption by virtue of the 4-R Act. The Board never addressed the pipelines' constitutional claims.

The pipelines appealed this denial to the Kansas Supreme Court. The pipelines asked the Kansas court to instruct BOTA that the court's holding in *CIG II* had been effectively overruled by *ACF Industries*, and to order BOTA to grant the pipelines a hearing on their claim that Kansas' preferential treatment of railroads over pipelines lacked any rational basis and was unconstitutional. The pipelines did not brief the merits of their constitutional claim, however, because that issue was not then before the Supreme Court of Kansas, BOTA never having ruled on the issue itself. Nevertheless, although the issue had neither been briefed nor argued to it, the Kansas Supreme

Court *sua sponte* decided the merits of the pipelines' constitutional challenges. The Court held that whether or not the 80% exemption received by the railroads was required by the 4-R Act, that exemption was adopted as a settlement of the earlier railroad litigation, and "while it is clear that the named railroads were treated differently, this treatment had nothing to do with discrimination and everything to do with the settlement of the lawsuit." *CIG III*, App. 75a, 83a.

The federal court litigation. Following this final unsuccessful attempt to obtain a hearing on their constitutional claims before the Kansas administrative and judicial tribunals, the pipelines filed this action in the United States District Court for the District of Kansas. The pipelines' lawsuit named as defendants respondents Lafaver, the Secretary of the Kansas Department of Revenue, and Beck, Director of the Division of Property Valuation of the Kansas Department of Revenue.[2] The pipelines' complaint noted that the Supreme Court of Kansas had thrown out their constitutional claims without providing the pipelines with an evidentiary hearing or even an opportunity to brief the merits of their legal claims. The pipelines' complaint sought, *inter alia*, a declaration that Kansas' property tax scheme unreasonably discriminated against pipelines in violation of the United States Constitution.

The state tax officials moved to dismiss the claims against them. The officials claimed that the district court lacked jurisdiction by virtue of the Tax Injunction Act, the *Rooker-Feldman* doctrine, and the Eleventh Amend-

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[2] The pipelines' suit also named as defendants various county officials. Because none of those defendants appealed the district court's denial of their motions to dismiss, the county officials are not presently before the Court. The pipelines' suit also named a few state agencies as defendants, but the pipelines subsequently moved to dismiss the state agencies, and that motion was granted by the court of appeals. App. 4a n.1.

ment. The district court rejected each of these arguments. The Court first concluded that the Tax Injunction Act did not bar the court's jurisdiction because the Kansas Courts had not provided the pipelines with a "plain, speedy and efficient" remedy. The district court held that "in the end" the pipelines' "constitutional claims were essentially terminated without any consideration." App. 35a. "The fact that procedures exist provides little assistance, and thus no bar under the Tax Injunction Act, if the procedures are ignored in fact." App. 35a. The court next rejected the state officials' Eleventh Amendment argument because the pipelines' action "was consistent with the exception to such immunity identified in *Ex parte Young*, 209 U.S. 123 (1908)." App. 35a-36a. Finally, the district court rejected the officials' *Rooker-Feldman* argument, concluding that "the present matter is not a collateral action directed at the merits of the decision of the Kansas court, but is an original action premised on the failure of the court to decide the constitutional issues raised by the pipelines." App. 36a.

On appeal, the Tenth Circuit reversed.[3] Although the court of appeals mused that it was "inclined to disagree" with the district court's factual conclusion that Kansas did not provide the pipelines with a "plain, speedy and efficient" remedy, the court did not reverse the district court's resolution of the Tax Injunction Act issue and certainly did not suggest that it was "clearly erroneous." Instead, the court concluded that "the Eleventh Amendment bars the pipelines' suit" regardless of the "adequacy of Kansas' judicial procedures." App. 26a-27a. The court agreed that the pipelines' request for prospective relief against the state officials satisfied the "traditional" rule of *Ex parte Young*. However, the court held, *sua sponte*, that this

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[3] The state officials appealed the denial of their Eleventh Amendment defense as of right, *see Puerto Rico Aqueduct and Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993), and the district court certified the Tax Injunction Act and *Rooker-Feldman* issues for interlocutory appeal. App. 38a-39a.

Court's recent decision in *Coeur d'Alene* "significant[ly] narrow[ed] [ ] the scope of the *Ex parte Young* doctrine." App. 19a. In particular, the Tenth Circuit read *Coeur d'Alene* as establishing "an important new requirement on federal courts as part of the *Ex parte Young* analysis," requiring federal courts to dismiss any *Ex parte Young* action where "the relief sought against a state official 'implicates special sovereignty interests.' " App. 21a. Concluding that the pipelines' challenge to Kansas' property tax scheme constituted "a major intrusion into Kansas' special sovereignty interests," App. 29a, the Court ordered the pipelines' claims againt the state officials dismissed.

REASONS FOR GRANTING THE PETITION

The issue presented in this case is unquestionably of fundamental importance, implicating the historic availability of the federal courts as forums for redress of constitutional violations by state officials. The Tenth Circuit's decision, if left standing, would not only deprive plaintiffs in tax cases of access to the federal courts to vindicate their federal rights, but would leave numerous such plaintiffs without any adequate judicial remedy at all. Where the state courts provide a "plain, speedy and efficient remedy" for challenges of state taxes, the Tax Injunction Act already precludes resort to the federal courts. 28 U.S.C. § 1341. No construction of the Eleventh Amendment is necessary in those cases to vindicate the State's interests in its taxing scheme. Thus, the *only* effect of the Tenth Circuit's decision is to foreclose federal court relief in situations where it is needed most: where the state courts do not provide adequate judicial remedies. The Tenth Circuit's decision thus effectively declares unconstitutional the "plain, speedy and efficient" exception to the Tax Injunction Act.

In addition to the evident importance of the issue that the Tenth Circuit erroneously decided, four particular considerations justify certiorari review. First, the Court

should grant certiorari to resolve the conflict among the courts of appeals over the standard governing the continued availability of *Ex parte Young* actions following this Court's divided opinions in *Coeur d'Alene*. In the decision below, the Tenth Circuit held that this Court's opinion in *Coeur d'Alene* effected a "significant narrowing of the scope of the *Ex parte Young* doctrine." App. 19a. In particular, the Tenth Circuit read *Coeur d'Alene* as establishing "an important new requirement on federal courts as part of the *Ex parte Young* analysis," requiring federal courts to dismiss any *Ex parte Young* action where "the relief sought against a state official 'implicates special sovereignty interests.' " App. 21a.

The Tenth Circuit's reading of *Coeur d'Alene* directly conflicts with decisions of other courts of appeals. For example, in stark contrast to the Tenth Circuit, the Ninth Circuit (in agreement with the Fifth and Eighth Circuits, see *infra*) has concluded that "[t]he viability of *Ex parte Young as traditionally applied* survives the Supreme Court's treatment of the issue in *Idaho* v. *Coeur d'Alene Tribe*." *Doe* v. *Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997) (emphasis added). Thus, while the Tenth Circuit would require each plaintiff to demonstrate that the particular *Ex parte Young* challenge that plaintiff brought did not "implicate special sovereignty interests," the Ninth Circuit has concluded that, despite *Coeur d'Alene*, "*Ex parte Young* is available where 'a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective.' " *Lawrence Livermore Nat'l Lab.*, 131 F.3d at 839 (quoting *Coeur d'Alene*, 117 S.Ct. at 2046). The Court should grant certiorari to resolve this sharp disagreement among the courts of appeals concerning an issue of fundamental constitutional and jurisdictional significance.

Second, the Tenth Circuit's holding that the Eleventh Amendment bars federal courts from hearing any *Ex parte Young* action that challenges the lawfulness of a

state tax directly conflicts with decisions both of this Court as well as decisions of the courts of appeals that have squarely held that *Ex parte Young* is available in tax cases. Noting that "[t]his Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State" that would be barred by the Eleventh Amendment, this Court has ruled unequivocally that the "general rule" of *Ex parte Young* may be "applied in suits against individuals threatening to enforce allegedly unconstitutional taxation." *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304-05 (1952). In the years since *Redwine* was decided, at least four Circuits—the Fourth, Fifth, Six and Ninth—have squarely held that a taxpayer may bring an *Ex parte Young* action to challenge the lawfulness of a State's tax. See, *e.g.*, *CSX Transp., Inc.* v. *Board of Pub. Works*, 138 F.3d 537, 540-41 (4th Cir.), *cert. denied*, 119 S. Ct. 63 (1998). See *infra*.

The Tenth Circuit's holding is likewise irreconcilable with numerous decisions by this Court and the courts of appeals that have sustained challenges to state taxes brought in the federal courts against claims that those actions were barred by the Tax Injunction Act (or principles of comity). See, *e.g.*, *Spector Motor Serv.* v. *O'Connor*, 340 U.S. 602, 604-05 (1951). See *infra*. Although none of these cases specifically addressed the Eleventh Amendment, each of these decisions necessarily assumed, as a jurisdictional matter, that the Eleventh Amendment would not otherwise bar the action. If the Tenth Circuit's holding under the Eleventh Amendment is correct, however, then each one of these numerous cases was wrongly decided.

Third, the Tenth Circuit's ruling effectively declares a critical component of an important Act of Congress—the Tax Injunction Act—unconstitutional, and certainly renders a vital portion of that Act a complete nullity. Although Congress enacted the Tax Injunction Act in

order generally to bar the federal courts from enjoining the enforcement of state taxes, both the text and the legislative history of the Tax Injunction Act make unmistakably clear that Congress equally intended that the federal courts *would* have jurisdiction to restrain unlawful state taxes where the state courts did not provide a "plain, speedy and efficient" remedy. Under the Tenth Circuit's holding, however, the Eleventh Amendment always bars an action against a state officer challenging a state's tax, whether or not the state courts provide a "plain, speedy and efficient" remedy—or any remedy at all. Had the Tenth Circuit expressly held that the Tax Injunction Act was unconstitutional, under this Court's practice that fact alone would have compelled the Court to review the decision. Because the Tenth Circuit's ruling is indistinguishable in effect from a decision striking the Act down as unconstitutional, the Court likewise should grant the petition for certiorari here.

Fourth and finally, unless reversed the Tenth Circuit's holding will leave numerous taxpayers without access to any judicial forum—state or federal—in which to vindicate their federal rights. Indeed, by closing off the federal courts entirely from hearing challenges to state taxes, the Tenth Circuit's decision would have the perverse effect of affirmatively rewarding those states that refuse to create adequate judicial remedies of their own. By eliminating those remedies, such states could all but completely insulate their tax schemes from constitutional challenge. Henceforth, if any state in the Tenth Circuit were entirely to abolish all judicial avenues for challenging the constitutionality of one of its taxes, the only judicial remedy that would be left for an aggrieved taxpayer to vindicate his or her federal due process or other rights would be to seek certiorari review in this Court of the State courts' bare-bones dismissal orders. Needless to say, the Tenth Circuit's holding thus does not merely "narrow[]" the availability of *Ex parte Young* actions. App. 19a. At least for tax cases, the Tenth Circuit's holding vitiates the

central purpose of the *Ex parte Young* doctrine, that of "giv[ing] life to the Supremacy Clause." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

1. Prior to this Court's decision in *Coeur d'Alene*, the contours of the Eleventh Amendment were well settled. Although the Eleventh Amendment deprives federal courts of jurisdiction over suits against the States themselves, as well as suits against state officers seeking retrospective (especially monetary) relief, this Court had repeatedly reaffirmed that a plaintiff alleging a continuing or future violation of his or her federal rights by a State could bring an action for prospective equitable relief against the State's officials notwithstanding the State's own Eleventh Amendment immunity to suit in federal court. *Ex parte Young*, 209 U.S. 123, 158-59 (1908); *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); *Milliken* v. *Bradley*, 433 U.S. 267, 289-90 (1977); *Edelman* v. *Jordan*, 415 U.S. 651, 664 (1974). Indeed, "relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986). On this basis, this Court has long upheld the availability of *Ex parte Young* actions to challenge state taxes that are alleged to violate federal law. See, *e.g.*, *Redwine*, 342 U.S. at 304-05.

The pipelines' suit against the state officials sought prospective relief against the future assessment and collection of taxes that the pipelines alleged violate their federal constitutional rights. Accordingly, as the Tenth Circuit recognized, the pipelines' lawsuit against the state tax officials fell well within the "traditional" rule of *Ex parte Young* and would, prior to this Court's decision in *Coeur d'Alene*, have been permitted to proceed. App. 16a, 23a.

This Court's decision in *Coeur d'Alene*, however, has created substantial disagreement, embodied in the opin-

ion below, among the courts of appeals concerning the continued viability of the "traditional" rule of *Ex parte Young*. *Coeur d'Alene* involved a suit brought by the Coeur d'Alene Tribe of Idaho against various officials of the State of Idaho, seeking, *inter alia*, "a declaratory judgment to establish its entitlement to the exclusive use and occupancy and the right to quiet enjoyment" of certain submerged lands of Lake Coeur d'Alene, as well as a "declaration of invalidity of all Idaho statutes" and regulations that regulate the submerged land. The Tribe also sought injunctive relief to prevent further use, occupancy or regulation of the land by Idaho. *Idaho* v. *Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2032 (1997). Writing for a majority of five, Justice Kennedy concluded that the suit against the state officers was barred by the Eleventh Amendment. Although Justice Kennedy's opinion for the Court stated that it did not "question the continuing validity of the *Ex parte Young* doctrine," the majority nevertheless reasoned that "[t]o interpret *Young* to permit a federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer . . . would be to adhere to an empty formalism." 117 S. Ct. at 2034. In a portion of his opinion in which only the Chief Justice joined, Justice Kennedy then proceeded to advocate a "case-by-case approach to the *Young* doctrine," one which looked at such factors as the availability of state-court remedies and the content of the federal right being asserted. 117 S. Ct. at 2039 (Kennedy, J.). Finally, speaking once again for a majority of the Court, Justice Kennedy's opinion concluded that the tribe's action was barred by the Eleventh Amendment because it was a "functional equivalent of a quiet title action which implicates special sovereignty interests." 117 S. Ct. at 2040. The Court pointed out that it was "common ground between the parties" that a quiet title action itself would be a form of retrospective relief barred by the Eleventh Amendment, and noted that the tribe's action in particular sought a "determination that

the lands in question are not even within the regulatory jurisdiction of the State." *Id.*

Justice O'Connor, joined by Justices Scalia and Thomas, concurred in part and concurred in the judgment. Justice O'Connor's concurrence criticized Justice Kennedy's opinion for "replac[ing] a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective with a vague balancing test" that focuses on the "importance of state interests." 117 S. Ct. at 2047. Likewise, the concurrence stressed that those Justices would "not narrow our Young doctrine, but [] would not extend it" to quiet title cases. *Id.* Like the opinion for the Court, however, Justice O'Connor's opinion deemed it significant that the tribe did not "merely seek to possess land that would otherwise remain subject to state regulation, or to bring the State's regulatory scheme into compliance with federal law," but sought in addition "to eliminate altogether the State's regulatory power over the submerged lands at issue," noting "the importance of submerged lands to state sovereignty." 117 S. Ct. at 2044.[4]

As the Fifth Circuit has noted, the separate opinions generated by the fractured Court in *Coeur d'Alene* have "cast[] some doubt upon previous conventional wisdom in this area," *Earles* v. *State Bd. of Certified Pub. Accountants,* 139 F.3d 1033, 1039 (5th Cir.), *reh'g en banc denied,* 146 F.3d 869 (1998), *and cert. denied,* No. 98-385, 67 USLW 3177 (U.S. Nov. 9, 1998), resulting in a square conflict among the courts of appeals concerning the continued validity of the "traditional" *Ex parte Young* doctrine. On the one hand, focusing on language in the majority's opinion in *Coeur d'Alene* sug-

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[4] Justice Souter, joined by Justices Stevens, Ginsburg and Breyer dissented, concluding that the suit fell within the traditional rule of *Ex parte Young* and thus was not barred by the Eleventh Amendment. 117 S. Ct. at 2047-48.

gesting that the tribe's suit was barred because it was the "functional equivalent of a quiet title action *which implicates special sovereignty interests,*" 117 S. Ct. at 2040 (emphasis added), the Tenth Circuit below held that *Coeur d'Alene* effected a "significant narrowing of the scope of the *Ex parte Young* doctrine." App. 19a. In particular, the Tenth Circuit read *Coeur d'Alene* as establishing "an important new requirement on federal courts as part of the *Ex parte Young* analysis," obliging federal courts to dismiss any *Ex parte Young* action where "the relief sought against a state official 'implicates special sovereignty interests.'" App. 21a. Relying on *Coeur d'Alene* the Tenth Circuit thus has adopted a case-by-case inquiry into the significance of the State's "sovereignty interests" implicated in the lawsuit. The First Circuit, without further explanation, has likewise stated that *Coeur d'Alene* "cabins and limits the availability of the *Ex parte Young* doctrine even where prospective . . . relief is sought against state officers . . . for allegedly ongoing violations of federal law." *Mills* v. *Maine*, 118 F.3d 37, 54 n.6 (1st Cir. 1997).

By contrast, following language in Justice O'Connor's controlling plurality opinion, three circuits—the Fifth, Eighth and Ninth—have held that "[t]he viability of *Ex parte Young as traditionally applied* survives the Supreme Court's treatment of the issue in *Idaho* v. *Coeur d'Alene Tribe.*" *Lawrence Livermore Nat'l Lab.*, 131 F.3d at 839 (emphasis added). All three circuits thus have held that whenever the traditional test is satisfied—*i.e.* where the suit is brought against a state official, alleges an ongoing violation of federal law, and seeks prospective rather than retrospective relief—an *Ex parte Young* action may be brought in federal court regardless of whether the matter at issue involves the " 'special sovereignty interests' " of a State. See *Mille Lacs Band of Chippewa Indians* v. *Minnesota*, 124 F.3d 904, 913-14

(8th Cir.), *cert. granted*, 118 S. Ct. 2295 (1998)[5]; *Earles*, 139 F.3d at 1039; *Lawrence Livermore Nat'l Lab.*, 131 F.3d at 839 (citation omitted) (with the exception of the Chief Justice and Justice Kennedy, "the rest of the Court made it clear that *Ex parte Young* is available where 'a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective' "). As the Fifth Circuit explained, "[w]e concur with the consensus among other courts that . . . a majority of the Court would continue to apply the rule of *Ex parte Young* as it has been traditionally understood." *Earles*, 139 F.3d at 1039.

This square circuit conflict is of far more than academic significance. Because the pipelines here sought prospective equitable relief against state officers to prevent a future violation of federal law, the pipelines' claims against the state tax officials would have been permitted to proceed had the claims been brought in the Fifth, Eighth or Ninth Circuits. Instead, because they were brought in the Tenth Circuit, the pipelines' claims against the state tax officials were thrown out of court. The Court should grant the petition for certiorari to provide for uniformity on this outcome-determinative question of fundamental constitutional significance.

2. This Court should likewise grant the petition for certiorari to resolve the conflict between the Tenth Circuit's decision below and numerous decisions of this Court and of the courts of appeals squarely holding that, notwithstanding the States' Eleventh Amendment immunity, a taxpayer may bring an *Ex parte Young* action against state officials seeking to enjoin the collection or assessment of taxes that are alleged to violate federal law.

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[5] The questions presented in *Mille Lacs* do not raise the Eleventh Amendment issue, and none of the briefs in the case addresses the Eighth Circuit's jurisdictional holding. This Court's resolution of *Mille Lacs* is extremely unlikely to resolve the circuit split on the continued validity of the "traditional" *Ex parte Young* doctrine.

The leading case so holding is *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304-05 (1952).

Redwine involved a suit by a railroad company seeking to enjoin the State Revenue Commissioner of Georgia from collecting an ad valorem tax that the railroad alleged would unconstitutionally impair the obligation of contract between the railroad and the state of Georgia. 342 U.S. at 300-01. A three-judge district court "dismissed [the railroad's] complaint for want of jurisdiction," holding that the action was "in effect an unconsented suit against the State prohibited by the Eleventh Amendment." 342 U.S. at 302. On appeal, this Court unanimously reversed.

After holding that the suit was not barred by the Tax Injunction Act, see *infra*, the Court held that the action against the tax commissioner "as an individual is not barred as an unconsented suit against the State." 342 U.S. at 305. The Court reasoned that the suit before it sought "to enjoin [the commissioner] from collecting taxes in violation of [the railroad's] rights under the Federal Constitution," and that the Court "has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State." 342 U.S. at 304. Noting that "[t]his general rule has been applied in suits against individuals threatening to enforce allegedly unconstitutional taxation," the Court concluded that the Eleventh Amendment did not bar the action. 342 U.S. at 304-05 (citing *Gunter* v. *Atlantic Coast Line R.R. Co.*, 200 U.S. 273 (1906); *Pennoyer* v. *McConnaughy*, 140 U.S. 1 (1891); *Allen* v. *Baltimore & O.R. Co.*, 114 U.S. 311 (1885)).

In the years following *Redwine*, a number of courts of appeals likewise have squarely held that the Eleventh Amendment does not bar an *Ex parte Young* action brought by a taxpayer to restrain enforcement of a tax alleged to violate federal law. As the Ninth Circuit stated the rule followed in the majority of circuits, "[a]lthough

the present action might result in California receiving less tax revenue, EMI seeks prospective injunctive and declaratory relief against state officials, and not a money judgment against the state. Therefore, the Eleventh Amendment is not a bar to EMI's action in federal court." *Capitol Industries-EMI, Inc.* v. *Bennett*, 681 F.2d 1107, 1120-21 (9th Cir. 1982) (footnote omitted). The Fourth Circuit has likewise held that "[a]n injunction against the future collection of the illegal taxes, even those that already have been assessed, is prospective, and therefore available under the *Ex parte Young* doctrine." *CSX Transp., Inc.*, 138 F.3d at 541. To similar effect are *Thiokol Corp.* v. *Department of Treasury*, 987 F.2d 376, 381-82 (6th Cir. 1993); and *Denton* v. *City of Carrollton, Georgia*, 235 F.2d 481, 485 (5th Cir. 1956). The Tenth Circuit's decision directly conflicts with each of these decisions.

Although the court of appeals did not cite *Redwine* in its opinion, it may have concluded that the long line of this Court's decisions culminating in *Redwine* was implicitly overruled by this Court's reasoning in *Coeur d'Alene*. Even if so, the court of appeals would not have been justified in failing to follow *Redwine*. It is by now well-established that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

In addition to conflicting directly with a number of decisions by this Court and the courts of appeals that have upheld the availability of *Ex parte Young* actions in tax cases, the Tenth Circuit's decision cannot be reconciled with numerous other decisions of this Court and the circuit courts applying the Tax Injunction Act. In particular, on a number of occasions this Court has upheld federal court actions seeking injunctive relief against state

taxation against claims that those actions were barred by the Tax Injunction Act. See, *e.g.*, *Redwine*, 342 U.S. at 304-05; *Spector Motor Serv.* v. *O'Connor*, 340 U.S. 602, 604-05 (1951); *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105-06 (1944); *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 626 (1946). Numerous decisions by the courts of appeals likewise have sustained the availability of a federal court action for injunctive relief notwithstanding the Tax Injunction Act on the ground that the particular state in question did not provide a "plain, speedy and efficient" remedy for the alleged violation. See, *e.g.*, *Zipperer* v. *City of Fort Myers*, 41 F.3d 619, 622-623 (11th Cir. 1995); *Northwest Airlines, Inc.* v. *Tennessee State Bd. of Equalization*, 11 F.3d 70, 72-74 (6th Cir. 1993); *Barringer* v. *Griffes*, 964 F.2d 1278, 1283-84 (2d Cir. 1992); *Direct Mktg. Ass'n, Inc.* v. *Bennett*, 916 F.2d 1451, 1453-57 (9th Cir. 1990); *Town of Ball* v. *Rapides Parish Police Jury*, 597 F.2d 43, 45-46 (5th Cir. 1979); *Garrett* v. *Bamford*, 538 F.2d 63, 67-72 (3d Cir. 1976). Each of these cases upheld the jurisdiction of the district court to entertain a suit to enjoin the collection or assessment of a state tax. If the Tenth Circuit's decision is correct, however, then each of these actions was in fact barred by the Eleventh Amendment, whether or not the Tax Injunction Act was otherwise satisfied. That the Tenth Circuit's decision thus would effectively reverse so many decisions by this Court and numerous lower federal courts provides yet further reason for the Court to grant the petition for certiorari.

3. In addition to conflicting with numerous decisions of this Court and of the other courts of appeals, the Tenth Circuit's decision in this case nullifies a vital component of a longstanding Act of Congress: the Tax Injunction Act, 28 U.S.C. § 1341. That Act provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of

such State." As its text makes clear, the Tax Injunction Act strikes a careful balance. On the one hand, the Act codifies the federal principle of comity to the States, under which the federal courts will avoid using their equitable powers to interfere unduly with a State's administration of its tax system. *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 73 (1976).

At the same time, the Act does *not* deprive federal courts of jurisdiction where the state courts do not provide "a plain, speedy and efficient remedy." The availability of federal court jurisdiction under the Act in such circumstances is, of course, no accident. As the Senate Report explains:

> It should be emphasized that the bill does not take away any equitable right of the taxpayer or deprive him of his day in court. Specific provision is made that the suit will not be withdrawn from the jurisdiction of the Federal district court except where there is a plain, speedy and efficient remedy at law or in equity in the courts of the State. *A full hearing and judicial determination of the controversy is assured.*

S. Rep. No. 75-1035, 2 (emphasis added). Congress thus clearly intended that the federal courts would be open to taxpayers seeking to enjoin state taxes alleged to violate federal law where the state courts themselves did not provide adequate remedies.

The decision by the Tenth Circuit, however, renders the state's obligation under the Tax Injunction Act to provide an adequate remedy a complete nullity, thereby thwarting Congress' intent. Under the Tenth Circuit's holding, a federal court action challenging a state's tax would be barred by the Eleventh Amendment, whether or not adequate state-court remedies were available. In the Tenth Circuit, therefore, the "exception" to the Tax Injunction Act could never be constitutionally applied. Indeed, if the Tenth Circuit's view of the Eleventh Amendment were correct, Congress simply wasted its breath when

it enacted the Tax Injunction Act, for no Congressional statute would be necessary to prevent that which the Eleventh Amendment itself already barred.

Where a lower court declares an Act of Congress unconstitutional, that action alone normally persuades this Court to grant plenary review. Yet, in the decision below the Tenth Circuit effectively declared a vital element of the Tax Injunction Act unconstitutional. The Court should follow the substance of its normal practice and grant the petition for certiorari here.[6]

4. Finally, unless reversed, the Tenth Circuit's decision would leave numerous taxpayers in States covered by the Tenth (and First) Circuits without *any* judicial forum in which to vindicate their federal claims. Under the holding below, any federal court action to enjoin a state tax is barred by the Eleventh Amendment, even where the state courts provide absolutely no remedy of their own, let alone a remedy that is "plain, speedy and efficient." Indeed, because the Tax Injunction Act of its own force already would bar federal court actions whenever the state courts provide adequate judicial remedies, the *only* effect of the Tenth Circuit's decision is to foreclose federal court relief in situations where it is needed most: where the state courts do not provide adequate judicial remedies.

The Tenth Circuit's construction of the Eleventh Amendment thus vitiates the core purpose behind the *Ex parte Young* decision. As this Court has noted: "[T]he availability of prospective relief of the sort awarded in

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[6] The decision below also casts unnecessary doubt on the constitutionality of the 4-R Act. That Act expressly authorizes the federal courts to enjoin state taxes that violate its provisions. *See* 49 U.S.C. § 11501(c). If the Tenth Circuit's holding is correct, however, then this provision of the 4-R Act would be unconstitutional, unless it constituted a valid abrogation of the states' Eleventh Amendment immunity. *But see CSX Transp. Inc.*, 138 F.3d at 540 (suggesting that 4-R Act might not be a valid exercise of Congress' abrogation power under the 14th Amendment).

Ex parte Young gives life to the Supremacy Clause. *Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.*" *Green*, 474 U.S. at 68 (emphasis added). The necessity of an *Ex parte Young* action is doubly acute here. Whereas *Ex parte Young* actions have traditionally been available regardless of whether a state provided adequate judicial remedies of its own, see *Coeur d'Alene*, 117 S. Ct. at 2045 (O'Connor, J., concurring), the absence of an *Ex parte Young* action where the state courts do not provide a "plain, speedy and efficient" remedy of their own would leave taxpayers with no means of " 'vindicat[ing] the federal interest.' " 117 S. Ct. at 2046 (O'Connor, J., concurring) (citation omitted).

It is thus deeply ironic that the Tenth Circuit thought that its construction of the Eleventh Amendment was required by this Court's decision in *Coeur d'Alene*. After all, even under the case-by-case approach that the Chief Justice and Justice Kennedy proposed, the first and perhaps most important factor in assessing the permissibility of an *Ex parte Young* action would have been the availability of a state court remedy. As the plurality opinion explained, "[w]here there is no available state forum the *Young* rule has special significance," because the lack of available state court relief "plac[es] upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law." *Coeur d'Alene*, 117 S. Ct. at 2035 (Kennedy, J., joined by Rehnquist, C.J.). Nothing in this Court's opinion in *Coeur d'Alene* thus justifies, much less requires, the inherently unfair result reached by the Tenth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 24, 1998

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 96-3250, 96-3345

ANR PIPELINE COMPANY
and COLORADO INTERSTATE GAS COMPANY,
Plaintiffs-Appellees,

v.

JOHN D. LAFAVER, Secretary of the Kansas Department of Revenue, in his official capacity; KANSAS DEPARTMENT OF REVENUE; MARK S. BECK, Director of the Division of Property Valuation of the Kansas Department of Revenue, in his official capacity; DIVISION OF PROPERTY VALUATION OF THE KANSAS DEPARTMENT OF REVENUE; and their respective predecessors and successors, in office,

Defendants-Cross- claim defendants-Appellants,

and

BROWN COUNTY BOARD OF COUNTY COMMISSIONERS; JUDY GRATHWOHL, Brown County Treasurer; CLARK COUNTY BOARD OF COUNTY COMMISSIONERS; COLEEN Z. BROWN, Clark County Treasurer; COMANCHE COUNTY BOARD OF COUNTY COMMISSIONERS; VELMA BASNETT, Comanche County Treasurer; DICKINSON COUNTY BOARD OF COUNTY COMMISSIONERS; LOUISE HABACKER, Dickinson County Treasurer; EDWARDS COUNTY BOARD OF COUNTY COMMISSIONERS; MARY I. CARLSON, Edwards County Treasurer; FINNEY COUNTY BOARD OF COUNTY COMMISSIONERS; RAYLENE NELSON,

Finney County Treasurer; FORD COUNTY BOARD OF COUNTY COMMISSIONERS; DOROTHY HUNTER, Ford County Treasurer; GEARY COUNTY BOARD OF COUNTY COMMISSIONERS; KATHY TREMONT, Geary County Treasurer; GRANT COUNTY BOARD OF COUNTY COMMISSIONERS; RITA GEE, Grant County Treasurer; GREELEY COUNTY BOARD OF COUNTY COMMISSIONERS; MARY D. GENTRY, Greeley County Treasurer; HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS; CHRIS SQUIRE, Hamilton County Treasurer; HASKELL COUNTY BOARD OF COUNTY COMMISSIONERS; NANCY WEEKS, Haskell County Treasurer; JACKSON COUNTY BOARD OF COUNTY COMMISSIONERS; MARILYN K. BROWN, Jackson County Treasurer; KEARNEY COUNTY BOARD OF COUNTY COMMISSIONERS; HOLLY LASHMET, Kearney County Treasurer; KIOWA COUNTY BOARD OF COUNTY COMMISSIONERS; ELSIE HARALDSON, Kiowa County Treasurer; MCPHERSON COUNTY BOARD OF COUNTY COMMISSIONERS; BRENDA BECKER, McPherson County Treasurer; MEADE COUNTY BOARD OF COUNTY COMMISSIONERS; WYNEMA DYE, Meade County Treasurer; MORTON COUNTY BOARD OF COUNTY COMMISSIONERS; LOIS HALL, Morton County Treasurer; NEMAHA COUNTY BOARD OF COUNTY COMMISSIONERS; ROSE M. WILHELM, Nemaha County Treasurer; POTTAWATOMIE COUNTY BOARD OF COUNTY COMMISSIONERS; LINDA HORGAN, Pottawatomie County Treasurer; PRATT COUNTY BOARD OF COUNTY COMMISSIONERS; DONNA SHELITE, Pratt County Treasurer; RENO COUNTY BOARD OF COUNTY COMMISSIONERS; LARRY R. TUCKER, Reno County Treasurer; RICE COUNTY BOARD OF COUNTY COMMISSIONERS; LILA BLACKBURN, Rice County Treasurer; RILEY COUNTY BOARD OF COUNTY COMMISSIONERS; R. EILEEN KING, Riley County Treasurer; SALINE COUNTY BOARD OF COUNTY COMMISSIONERS; KEITH LILLY, Saline County Treasurer; SEWARD COUNTY BOARD OF COUNTY COMMISSIONERS; JOE NEESE, Seward County Treasurer; STAFFORD COUNTY BOARD OF COUNTY COMMISSION-

ERS; LYNDA L. MCALLISTER, Stafford County Treasurer; STANTON COUNTY BOARD OF COUNTY COMMISSIONERS; PHYLLIS KISTLER, Stanton County Treasurer; STEVENS COUNTY BOARD OF COUNTY COMMISSIONERS; BELVA HICKEY, Stevens County Treasurer; WABAUNSEE COUNTY BOARD OF COMMISSIONERS; ELLA MAE KRAUS, Wabaunsee County Treasurer; and all their respective predecessors and successors in office,

Defendants-Cross-Claim plaintiffs.

July 21, 1998

Before ANDERSON, EBEL and KELLY, Circuit Judges.

EBEL, Circuit Judge.

This appeal involves the efforts of two natural gas pipelines, in the face of burgeoning economic competition in the deregulated energy industry, to deal with what they regard as the unequal property tax system in Kansas vis-a-vis the pipelines' traditional competitors, railroad companies, as well as the pipelines' claims of unfair judicial process in the state courts of Kansas. We must dismiss this appeal, vacate the district court's judgment, and direct the district court to dismiss all claims in this case against both the state agency defendants and the state official defendants. The Eleventh Amendment stands as a bar to federal jurisdiction over all of these claims, and the plaintiffs' suit is not saved by the *Ex parte Young* doctrine.

Background

These two appeals arise out of a single district court order denying a motion to dismiss under Fed.R.Civ.P. 12(b)(1) for lack of subject-matter jurisdiction, filed by

the state agency defendants and the state official defendants (collectively referred to as "state defendants") two weeks after the plaintiffs filed this suit.[1] The state defendants filed one appeal, No. 96-3250, as an "appeal by right" based on the district court's denial of the state defendants' claim of sovereign immunity under the Eleventh Amendment. Subsequently, the state defendants also filed a separate motion seeking permission to file a second interlocutory appeal challenging that portion of the court's decision involving the Tax Injunction Act and the *Rooker/Feldman* doctrine. The motion was granted, and this second appeal was denominated No. 96-3345. Despite this procedural division of the issues between the two separate appeals, we believe the interests of justice would be best served by consolidating both appeals and disposing of this case in a single opinion.[2]

1. The 4-R Act.

The seeds of this property tax dispute were planted in the Railroad Revitalization and Regulatory Reform Act of

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[1] A second group of defendants, involving most of Kansas' county commissioners and county treasurers [hereinafter the "county defendants"], were parties below but they have not filed their own interlocutory appeal in this case. As a result, this opinion is limited solely to the question of jurisdiction over the state defendants.

Following oral argument, the plaintiffs-appellees filed an uncontested motion with this court to dismiss the state agency defendants from this case. In light of our resolution of this appeal, it is apparent that the plaintiffs-appellees cannot maintain this federal action against the state agency defendants. Accordingly, we grant the plaintiffs-appellees' motion to dismiss the Kansas Department of Revenue and the Kansas Division of Property Valuation as defendants.

Based on this ruling, then, the only defendants still germane to this appeal are the two state official defendants: the secretary of the Department of Revenue and the director of the Division of Property Valuation.

[2] As a result, we direct the Clerk to consolidate these two appeals.

1976 ("4-R Act"), Pub.L. 94-210, 90 Stat. 31 (codified as amended at 49 U.S.C. § 11501 (1994)). Under this legislation, Congress prohibited state and local taxing agencies from imposing discriminatory taxes on railroads. *See* 49 U.S.C. § 11501(b). The legislation generated vast amounts of litigation in which railroads alleged that various taxing schemes by states and local governments violated the 4-R Act. *See, e.g., Burlington N. R.R. Co. v. Huddleston,* 94 F.3d 1413 (10th Cir.1996) (the most recent Tenth Circuit case on 4-R Act). One of those 4-R Act lawsuits involved a challenge by railroads operating in Kansas against the state's taxation scheme for the railroads' personal property. On August 11, 1989, that litigation was resolved with a consent decree that required the Kansas Division of Property Valuation to exempt 80% of the railroads' personal property from the tax roll, and then to levy a 30% tax assessment on the remainder of the railroad's real and personal property.

Seeing this dramatic tax break for their competitors, several natural gas pipeline companies requested similar treatment from the Kansas Division of Property Valuation, but the state refused. The pipeline companies then went to court. From the outset of the litigation underlying these appeals, the pipeline companies have argued that they are similarly situated vis-a-vis the railroad companies, i.e., that both are public utilities under Kansas law. *See* Kan. Stat. Ann. §§ 79-5a01(a)(1) & (a)(4) (1989). The pipelines argue that they have an equal protection right to the same tax breaks provided to the railroads. *See* U.S. Const., XIV amend., § 1.

Key to the pipelines' equal protection claim is their concomitant allegation that they were denied procedural due process by the tax appeal proceedings in Kansas at both the administrative and judicial level. For this reason, the sequence of events in the underlying litigation is important.

2 The pipelines' state-court litigation.

After the August 11, 1989, consent decree exempting much of the railroads' Kansas personal property from taxation, the pipelines filed suit in Shawnee County District Court claiming their 1989 tax assessment by the Kansas Division of Property Valuation violated state and federal guarantees of equal protection. In an unreported decision, the state district court dismissed the suit for lack of subject-matter jurisdiction because the pipelines had failed to file an appeal of the assessment before the Kansas Board of Tax Appeals ("BOTA"). In 1993, the Kansas Court of Appeals reversed the district court's decision and remanded the case for consideration of the pipelines' equal protection arguments. *See Colorado Interstate Gas Co. v. Beshears,* 18 Kan.App.2d 814, 860 P.2d 56, 61-62 (1993) [hereinafter *"CIG I"*] (holding that the failure to exhaust administrative remedies was no bar to jurisdiction when no actual administrative remedies were available).

During the pendency of this first case, the pipelines filed appeals of their 1990 and 1991 tax assessments with BOTA, again claiming that the lack of favorable exemptions for themselves, vis-a-vis the railroads, violated the pipelines' right to equal protection. The 1990 and 1991 appeals were submitted to BOTA on a stipulated record, and the Board rejected the challenges. The pipelines appealed that decision to the Kansas Supreme Court, which affirmed the BOTA decision. *See In re Appeal of ANR Pipeline Co.,* 254 Kan. 534, 866 P.2d 1060 [hereinafter *"CIG II (ANR Pipeline)"*], *cert. denied,* 513 U.S. 917, 115 S.Ct. 296, 130 L.Ed.2d 209 (1994). The Kansas Supreme Court held that any disparate treatment between the pipelines and the railroads—including the 80% exemption of personal property—was mandated by the 4-R Act. *See id.* at 1067-68. The court also held that Kansas' constitutional guarantees of equal protection and uniform

taxation were preempted by the 4-R Act. *See id.* at 1066-68.

Just three days after the Kansas Supreme Court filed its decision in *CIG II (ANR Pipeline)*, the Supreme Court of the United States filed a decision in an unrelated case dealing with a similar issue of state property tax exemptions for railroads under the 4-R Act. *See Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994). In *ACF Industries*, the state of Oregon had denied a request for property tax exemptions filed by companies that lease railcars to railroads and interstate shippers. *Id.* at 335-36, 114 S.Ct. 843. The railcar companies argued that the failure of the state to extend its partial exemption of tangible property to the railcar companies—while the state provided partial exemptions to certain agricultural and other businesses—was a violation of the anti-discrimination provisions of the 4-R Act. *See id.* The Supreme Court disagreed, holding that the 4-R Act does not limit a state's discretion to exempt non-railroad property, but not railroad property, from ad valorem taxes of general application. *See id.* at 347-48, 114 S.Ct. 843.

In Kansas, the pipelines interpreted the Supreme Court's decision in *ACF Industries* as a frontal assault on the rationale of the earlier Kansas Supreme Court decision in *CIG II (ANR Pipeline)*. Consequently, the pipelines filed a motion for rehearing in *CIG II (ANR Pipeline)*, arguing that the Supreme Court's decision in *ACF Industries* seriously undermined the Kansas court's justification under the 4-R Act. The Kansas Supreme Court summarily denied the petition for rehearing without comment. The pipelines then filed a petition for a writ of certiorari, arguing in part that the Kansas decision in *CIG II (ANR Pipeline)* was inconsistent with the Supreme Court's decision in *ACF Industries*. The Supreme Court denied the certiorari petition without comment. *See ANR Pipeline Co. v. Director*

of Property Valuation, 513 U.S. 917, 115 S.Ct. 296, 130 L.Ed.2d 209 (1994).

During the pendency of this *CIG II* (*ANR Pipeline*) litigation, the pipelines filed new appeals of their 1992 and 1993 tax assessments with BOTA. This time, in addition to their equal protection claims, the pipelines argued that the Kansas Supreme Court's decision in *CIG II (ANR Pipeline*) had been effectively overruled by the U.S. Supreme Court's decision in *ACF Industries*. The 1992 appeal was submitted on the basis of stipulated facts, but there was no stipulation with respect to the 1993 appeal. BOTA dismissed both appeals without taking any evidence on the question of the disparate treatment between the railroads and the pipelines. BOTA ruled that its decision must be controlled by the Kansas Supreme Court's ruling in *CIG II* (*ANR Pipeline*).[3]

The pipelines appealed again to the Kansas Supreme Court, this time on the basis of their 1992 and 1993 tax appeals, asking the court to instruct BOTA that *CIG II (ANR Pipeline)* was no longer controlling law. Instead, the Kansas Supreme Court ruled on the pipelines' constitutional claims. *See In re Appeals of Colorado Interstate Gas Co.*, 258 Kan. 310, 903 P.2d 154 (1995) [hereinafter "*CIG III*"]. The Kansas Supreme Court held that the disparate treatment between the railroads and the pipelines was rational because it arose from the negotiated settlement of the initial 4-R Act litigation brought by the railroads:

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[3] From the text of the BOTA ruling, it appears that the Board did not address the constitutional claims raised by the pipelines. The Board said that in *CIG II (ANR Pipeline)*, "[t]he Kansas Supreme Court ruled that the 4-R Act only applies to railroads. . . . The taxpayer is not a railroad and thus, is not entitled to the similar tax treatment provided by the 4-R Act." The Board apparently did not address the pipelines' claim that whether or not the pipelines met the definition of a railroad, they were similarly situated with the railroads as public utilities, and as a consequence, they were entitled to equal treatment.

> While the granting of the 80% personal property tax exemption may have been based upon the belief that the 4-R Act required it, a belief that may be false in light of the United States Supreme Court's decision in *ACF Industries*, the settlement represents a cost-benefits analysis of continued litigation. . . .
>
> We are not prepared to state that the granting of the 80% personal property tax exemption to the named railroads in protracted federal litigation, as part of a negotiated settlement discriminated against CIG and ANR.

Id. 903 P.2d at 158-59. On the basis of this legal conclusion, the Kansas Supreme Court dismissed the 1992 tax appeal. *See id.* at 159. The court, however, remanded the 1993 appeal for factual findings. *See id.* at 160. The Kansas court held that it was error to decide the 1993 tax appeal without an evidentiary hearing. *See id.*

3. The pipelines' federal court litigation.

Rather than file a petition for a writ of certiorari on this latest Kansas Supreme Court decision, the pipelines filed the instant action in federal district court. The complaint asserted federal court jurisdiction under 28 U.S.C. § 1331 (federal-question jurisdiction) and 28 U.S.C. § 1343 (civil-rights jurisdiction) and alleged that the Tax Injunction Act, 28 U.S.C. § 1341, was no bar to the federal court's jurisdiction.[4] The pipelines' complaint involved the state's property tax valuations of their personal property from 1990 to 1993, alleging that those valuations violated the pipelines' federal equal protection and due process

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[4] The pipelines sought and received permission to amend their original complaint, but the additional claims in the amended complaint were not before the district court when it considered the state defendants' motion to dismiss, and as a consequence, those claims are not before us in this appeal.

rights under the Fourteenth Amendment.[5] The pipelines' complaint requested money damages against the county defendants and declaratory and equitable relief against the state defendants. The declaratory relief sought was a declaration that "Defendants have and continue to wrongfully value, assess, tax, and retain excessive taxes paid by [the pipelines] that are substantially different from those valued, assessed, taxed, collected and retained from similarly situated taxpayers, without a rationally based legitimate state interest, in violation of the Equal Protection Clause of the United States." This declaratory judgment request also asked the district court to take the following action: "to declare that [the Division of Property Valuation] should recertify to Counties for subject and future tax years lawful values which comply with state and federal constitutions." [6]

In response to this complaint, the county defendants filed cross-claim complaints against the state defendants, which the state defendants answered, and all the defendants filed various motions under Fed.R.Civ.P. 12(b)(1) asking the district court to dismiss the plaintiff's suit. The district court dismissed the county defendants' motions to

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[5] The pipelines also asserted state-law claims for violations of the Kansas Constitution's equal protection and uniform taxation clauses, as well as a claim under Kansas common law for unjust enrichment. However, following oral arguments, the pipelines submitted a motion in this court to dismiss these state-law claims against the state defendants, which we grant.

[6] The pipelines' request for a "declaration" that the state "should recertify" the pipelines' tax assessment might be more accurately characterized as a request for an "injunction." However, the pipelines adamantly insist that they have not asked for injunctive relief; they insist that their complaint against the state defendants seeks only declaratory relief. (*See* Appellees Letter of Mar. 24, 1997 to Tenth Circuit Court of Appeals (responding to the appellant's submission of supplemental authority).) Nevertheless, the characterization of this form of relief as "declaratory" or "injunctive" is not dispositive to our resolution here, and thus, we need not wade into that muddy water.

dismiss in the same order on appeal here, but because the county defendants are not parties to this appeal, we decline to consider the district court's decision on those motions.

Finally, as the defendants' motions were pending in federal district court, the last installment of the Kansas state-court proceedings went forward in the Shawnee County District Court, where the state court took up the remand it had received with respect to the 1989 tax assessment in *CIG I* The state filed a motion for summary judgment, arguing that the constitutional claims raised by the pipelines had been decided by the Kansas Supreme Court in *CIG III*. The pipelines, on the other hand, filed a motion for a stay pending the outcome in federal district court on their federal-court claims, including their claim that the Kansas courts had failed to provide due process on the pipelines' equal protection claims. Without conducting a hearing on either motion, the state district court apparently issued an order dismissing the motion for a stay and granting summary judgment to the state on the basis of the Kansas Supreme Court decision in *CIG III*. In a second appeal to the Kansas Court of Appeals, the appellate court again reversed the district court, although we have no indication in the record before us of the basis of that unpublished decision or its instructions to the lower court. *See Colorado Interstate Gas Co. v. Beshears,* 951 P.2d 1324 (Kan.Ct.App.1998) (table disposition).

4. The federal district court's ruling.

In the face of this complex procedural history, the federal district court below issued the Memorandum and Order that is on appeal here: *ANR Pipeline Co v. Lafaver,* No. 96-1089-JTM, 1996 WL 363047 (D.Kan. June 26, 1996) [hereinafter *"CIG IV"*]. In denying all the various motions to dismiss, the district court held that its jurisdiction was not blocked by the Tax Injunction Act because the Kansas authorities had failed to provide a

"plain, speedy, and efficient remedy" in the Kansas courts: "The pipelines consistently attempted to protect their rights under state law, yet in the end their constitutional claims were essentially terminated without any consideration." *Id.* at *2. The district court said the defendants could not rely on the existence of Kansas' tax appeal procedures as proof that the state provided a plain, speedy, and efficient remedy "if the procedures are ignored in fact." *See id.*

The district court also ruled that the pipelines' claims in this case did not violate the *Rooker/Feldman* doctrine barring lower federal court review of state court decisions because the pipelines had narrowly focused their suit away from any federal court review of the Kansas Supreme Court's decisions in *CIG II (ANR Pipeline)* and *CIG III*. *See CIG IV*, 1996 WL 363047, at *3. The district court held that the claims in the separate federal lawsuit were an original action—rather than a collateral attack—"premised on the failure of the [Kansas] court to decide the constitutional issues raised by the pipelines." *Id.*

Finally, on the state defendants' claim of Eleventh Amendment immunity, the district court ruled that to the extent the pipelines sought money damages, their suit was actually against the county defendants, which are not arms of the state, and thus was not blocked by the Eleventh Amendment. *See id.* at *3. The district court held that the remaining claims against the state defendants came within the *Ex parte Young* rule under the Eleventh Amendment because these claims sought only prospective relief for a violation of "the constitutional guarantees of Kansas and the United States" *Id.* at *2.

Following the denial of their motion for reconsideration, the state defendants took the instant appeals. Despite the interlocutory nature of this case we have appellate jurisdiction over the district court's ruling on the Eleventh Amendment issue under the collateral order doctrine of

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993). *See also Garramone v. Romo*, 94 F.3d 1446, 1452 (10th Cir.1996) (allowing an interlocutory appeal from the denial of claim of Eleventh Amendment immunity under the collateral order doctrine). We also have appellate jurisdiction over the *Rooker/Feldman* and Tax Injunction Act issues under the certification procedures for interlocutory appeals based on 28 U.S.C. § 1292 (b) and Fed.R.Civ.P. 56(c).[7] We review de novo a district court's consideration of subject-matter jurisdiction in the context of a Rule 12(b)(1) motion to dismiss, providing plenary review to issues under the Eleventh Amendment. *See SK Finance SA v. La Plata County, Bd. of County Comm'rs*, 126 F.3d 1272, 1275 (10th Cir.1997) (dismissal on Rule 12(b)(1) standard); *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1483 (10th Cir.1995) (dismissal on Eleventh Amendment/*Ex parte Young* doctrine).

I. State sovereign immunity.[8]

Two landmark Supreme Court cases on the scope of a state's sovereign immunity under the Eleventh Amend-

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[7] In its Memorandum Order denying the motion for reconsideration, the district court granted the state defendants' separate request for interlocutory certification of the appeal in No. 96-3345 under 28 U.S.C. § 1292(b).

[8] We note that federal courts should avoid reaching the merits of a constitutional issue when the case may be decided on statutory grounds. However, in this case, we turn first to the constitutional issue of state sovereign immunity because it presents a controlling jurisdictional question that is antecedent to the other two issues raised on appeal, i.e., the Tax Injunction Act and the *Rooker/Feldman* doctrine.

First, the statutory limitations of the Tax Injunction Act are not jurisdictional; rather, they define the scope of remedies a federal court may grant in a suit challenging taxes levied under state law. *See* 28 U.S.C. § 1341. Second, although the *Rooker/Feldman*

ment ultimately control the outcome of this case. *See Idaho v. Coeur d'Alene Tribe,* —— U.S. ——, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997); *Seminole Tribe v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). However, a portion of the pipelines' claims against the state defendants may be disposed of by relying on the Eleventh Amendment case law predating *Coeur d'Alene Tribe* and *Seminole Tribe,* and consequently we turn to those matters first.

A. The Eleventh Amendment.

The text of the Eleventh Amendment was proposed and quickly adopted by the states soon after the Supreme Court handed down its decision in *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793), which interpreted the diversity jurisdiction clauses in section 2 of Article III as abrogating sovereign immunity for the states. *See Seminole Tribe,* 116 S.Ct. at 1148-49 (Souter, J., dissenting) (reviewing the history of the passage of the Eleventh Amendment). In an obvious reference to Article III's use of the phrase "The judicial Power of the United States," the Eleventh Amendment reads as follows,

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., XI amend. Although the language of the text does not require it, the Supreme Court consistently has interpreted the Eleventh Amendment as barring not only suits against a state by citizens of another state, but

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doctrine does indeed involve a jurisdictional issue, *see Facio v. Jones,* 929 F.2d 541, 543 (1991), in this case, the appellants' allegations of a due process violation are sufficient to avoid dismissal under the *Rooker/Feldman* doctrine. The appellants have made clear that their complaint in this case does not contest the finality of the Kansas Supreme Court's decision in *CIG III,* but rather, they complain about the procedural fairness of Kansas' review of claims in subsequent proceedings.

also suits against a state by that state's own citizens. *See Hans v. Louisiana,* 134 U.S. 1, 13-15, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *Edelman v. Jordan,* 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). As the Court has noted, the Eleventh Amendment stands "not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford v. Native Village of Noatak & Circle Village,* 501 U.S. 775, 779, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991). That "presupposition" is the doctrine of sovereign immunity, i.e., that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*'" *Hans,* 134 U.S. at 13, 10 S.Ct. 504 (emphasis in original) (quoting *The Federalist,* No. 81 (A.Hamilton)).

Applying this notion of sovereign immunity, the Court has held that a citizen's suit against a state agency is barred by the Eleventh Amendment just as surely as if the suit had named the state itself. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Furthermore, it does not matter what form of relief a citizen might request in a suit against a state agency; even a suit solely for prospective injunctive relief when it is brought against a state agency qua state agency is barred by the amendment. *See Cory v. White,* 457 U.S. 85, 90, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982).[9] Finally, when a suit seeks money damages against an official of a state agency, suing that official in his or her official capacity, then the "real party in interest" is the state, and the suit is barred by the Eleventh Amendment. *See Edelman,* 415 U.S. at 663, 94 S.Ct. 1347.

There are two narrow exceptions to the doctrine of sovereign immunity as it is enshrined in the Eleventh Amendment: 1) A state may waive its Eleventh Amendment immunity by consenting to be sued, but only in the

[9] It is on the basis of this holding in *Cory* that we grant the plaintiffs' motion to dismiss the claims against the state agencies.

clearest and most unmistakable terms, and 2) Congress may abrogate the states' Eleventh Amendment immunity, but again, only by using the clearest and most unmistakable terms, and only when Congress is exercising a power granted to it by a constitutional amendment post-dating the Eleventh Amendment, i.e., principally section 5 of the Fourteenth Amendment. *See Aaron v. Kansas,* 115 F.3d 813, 814 (10th Cir.1997) (discussing the impact of *Seminole Tribe* on case law under the Eleventh Amendment).

B. The *Ex parte Young* "exception."

1. The traditional view.

A third route for a party to obtain relief against a state agency in federal court is the so-called *Ex parte Young* "exception" to the Eleventh Amendment, although in nominal form the rule is not an "exception" because the citizen's suit is not against the state, but rather it is a suit against a state official. In such a suit, when a party seeks only prospective equitable relief—as opposed to any form of money damages or other legal relief—then the Eleventh Amendment generally does not stand as a bar to the exercise of the judicial power of the United States. *See Ex parte Young,* 209 U.S. 123, 158-159, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *see also Coeur d'Alene Tribe,* 117 S.Ct. at 2043 (O'Connor, J., concurring) ("The *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity.")

Under the *Ex parte Young* legal fiction, when an official of a state agency is sued in his official capacity for prospective equitable relief, he is generally not regarded as "the state" for purposes of the Eleventh Amendment and the case may proceed in federal court.[10] *See Green*

[10] This interpretation of the *Ex parte Young* doctrine sheds light on why an official-capacity suit against a state official is not

v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985) (reading *Ex parte Young* to hold "that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law"). In one of our own recent Eleventh Amendment cases, we explained the traditional view of the *Ex parte Young* doctrine:

> [W]hen a suit names a state official as the defendant, the Eleventh Amendment still bars the action if "the state is the real, substantial party in interest." Whether the state is the real party in interest turns on the relief sought by the plaintiffs. Suits that seek prospective relief are deemed to be suits against the official, while suits that seek retroactive relief are deemed to be suits against the state.

Powder River Basin, 54 F.3d at 1483 (quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945)).

Of course, because of the important interests of federalism and state sovereignty implicated by the *Ex parte Young* doctrine, the rule has its limits. First, federal courts have no jurisdiction to entertain a suit that seeks to require the state official to comply with state law—only allegations of violations of federal law are sufficient to come within the *Ex parte Young* rule. *See Pennhurst*,

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always blocked by the Elevnth Amendment. *See Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). It is certainly true that the Court declared in rather emphatic language in *Graham* that an official-capacity suit "is, in all respects other than name, to be treated as a suit against the [official's] entity." *Id.* at 166, 105 S.Ct. 3099. This statement, however, cannot be interpreted to mean that an official-capacity suit against a state agency official always should be treated as a suit against the state. As the Court quickly added in *Graham*, "official-capacity actions for prospective relief [against state officials] are not treated as actions against the State." *Id.* at 167 n. 14, 105 S.Ct. 3099; *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n. 10, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

465 U.S. at 106, 104 S.Ct. 900 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. . . . We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.").[11] Second, the doctrine will not go so far as to allow federal jurisdiction over a suit that seeks to redress past wrongs—only ongoing violations are covered. *See Papasan v. Allain*, 478 U.S. 265, 277-78, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) ("*Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past. . . ."). Third, the doctrine does not allow a federal court to declare past state conduct unconstitutional when the only purpose for such a declaratory judgment would be its res judicata effect in a subsequent state-court proceeding; such a declaration would have the effect of adjudicating the liability issues in a damages action against the state even though a direct federal suit for damages would be barred by the Eleventh Amendment. *See Green*, 474 U.S. at 73, 106 S.Ct. 423. And fourth, although the doctrine will allow injunctive relief that might have a substantial ancillary effect on a state treasury, it does not allow an award for monetary relief that is the practical equivalent of money damages, even if this relief is characterized as equitable. *See Edelman*, 415 U.S. at 668, 94 S.Ct. 1347 (holding that the *Ex parte Young* rule will not allow an award of "equitable restitution" when the "practical effect [is] indistinguishable in many respects from an award of damages" and when it is "measured in terms of a monetary loss resulting from a past breach").

These limitations on the *Ex parte Young* doctrine are well-settled, and they informed the Supreme Court's recent

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[11] On the basis of *Pennhurst*, we grant the plaintiffs' to dismiss their state law claims.

pronouncement that "We do not, then, question the continuing validity of the *Ex parte Young* doctrine." *See Coeur d'Alene Tribe*, 117 S.Ct. at 2034. Despite this pronouncement, the Court's decisions in *Coeur d'Alene Tribe* and *Seminole Tribe* mark a significant narrowing of the scope of the *Ex parte Young* doctrine. *See V-1 Oil Co. v. Utah State Dep't of Public Safety*, 131 F.3d 1415, 1421 n. 2 (1997) (recognizing that *Seminole Tribe* limited *Ex parte Young*, but affirming the continued vitality of the *Ex parte Young* doctrine).

2. New case law.

The first shift arose in *Seminole Tribe*, a case that involved a federal suit by an Indian tribe seeking to force the state of Florida to comply with provisions of the Indian Gaming Regulatory Act ("IGRA"). *Seminole Tribe*, 116 S.Ct. at 1121. In addition to naming the state itself as a party, the suit also named Florida's Governor Lawton Chiles and sought to invoke the *Ex parte Young* rule allowing for federal jurisdiction over claims for prospective injunctive relief against state officials. *See id.* 116 S.Ct. at 1132. The Court, however, held that the *Ex parte Young* fiction should not be invoked where Congress "has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right. . . ." *Id.* The Court ruled that the federal courts are not free to imply the wide-ranging, judge-made remedial doctrine of *Ex parte Young* when Congress has seen fit to craft a significantly narrower statutory remedy. *See id.* 116 S.Ct. at 1133 ("[T]he fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under [the IGRA].").

We read in *Seminole Tribe* an obligation for the federal courts to examine Congress' stated intent with respect to the scope of statutory remedies that may be available in any case where an *Ex parte Young* issue is raised. The

crucial inquiry is whether Congress has expressed an intent, through some kind of statutory scheme, to limit or prevent potential remedies in a private cause of action even though broader remedies might otherwise be available against the state through the *Ex parte Young* rule. If so, then under *Seminole Tribe,* the federal courts are not ordinarily free to go beyond that congressional intent.

The second narrowing of the *Ex parte Young* doctrine arose in *Coeur d'Alene Tribe,* a case involving a federal suit by an Indian tribe seeking a declaratory judgment establishing its right to quiet enjoyment over the submerged lands of Lake Coeur d'Alene, in addition to seeking prospective injunctive relief against numerous Idaho state officials to prevent them from exercising the state's asserted regulatory jurisdiction over those submerged lands. *Coeur d'Alene Tribe,* 117 S.Ct. at 2032. The Court was badly fractured by the case,[12] but a majority of justices agreed that the *Ex parte Young* doctrine could not save the tribe's federal suit even though the tribe sought only prospective equitable relief and its suit did not run afoul of any of the other long-recognized limitations to the doctrine. *See id.* 117 S.Ct. at 2042 (Kennedy, J., majority opinion). Instead, a majority of justices agreed that the tribe's requested injunctive relief would be the

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[12] Justice Kennedy wrote the principal opinion for the Court, but key provisions of his opinion garnered only one other vote. *See Coeur d'Alene Tribe,* 117 S.Ct. at 2031 (Kennedy, J., minority opinion, with Rehnquist, C.J., as to Parts II.B, II.C, and II.D). The controlling concurrence by Justice O'Connor rejected Justice Kennedy's view that the *Ex parte Young* doctrine should be applied on a case-by-case approach. *See id.* at 2043 (O'Connor, J., concurring in judgment, with Scalia, J., and Thomas, J.) The dissent by Justice Souter rejected both Justice Kennedy's minority view and the position of common ground for the Court's majority, i.e., that the *Ex parte Young* doctrine may not be used to obtain prospective injunctive relief that is the functional equivalent of a quiet title action against a state, when that relief implicates special sovereignty interests. *See id.* at 2047 (Souter, J., dissenting, with Stevens, J., Ginsburg, J., and Breyer, J.)

"functional equivalent" of a quiet title action against the state. *See id.* at 2040 (Kennedy, J., majority opinion); *id.* at 2043 (O'Connor, J., concurring). That kind of relief "implicates special sovereignty interests" that the federal courts must carefully evaluate, bearing in mind the fundamental place of state sovereignty in our federal system. *See id.* at 2040 (Kennedy, J., majority opinion). After cataloguing the deep historical roots, and the legal importance, of state regulatory control over, and public ownership of, streams and lakes, the Court ruled that the *Ex parte Young* doctrine may not be used to support prospective federal court injunctive relief against state officials when that relief is just as much an intrusion on state sovereignty as an award of money damages:

> It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. . . . The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

Id. at 2042 (Kennedy, J., majority opinion).

We read *Coeur d'Alene Tribe* as imposing an important new requirement on federal courts as part of the *Ex parte Young* analysis. In light of *Coeur d'Alene Tribe*, federal courts must examine whether the relief being sought against a state official "implicates special sovereignty interests." If so, we must then determine whether that requested relief is the "functional equivalent" to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment. In the end, we must not extend the *Ex parte Young* doctrine to allow a suit for prospective equitable relief when that relief would be just as intrusive, if not more so, into core aspects of a state's sovereignty.

C. Kansas' state sovereignty over taxation issues.

With this understanding of the doctrine of sovereign immunity under the Eleventh Amendment, we now turn to the effect of that doctrine on the suit by the natural gas pipelines against the Kansas officials in charge of property tax valuations for the state of Kansas. In their suit, the pipelines have asked the court to declare that these state defendants "have and continue to wrongfully value, assess and retain excessive taxes" against the pipelines. They also have asked the court to declare that the director of the Division of Property Valuation "should recertify to Counties for subject and future tax years lawful values which comply with state and federal constitutions."

It is evident merely from reading the text of these requests for declaratory relief that at least a portion of the requested relief runs afoul of some of the long-accepted principles of the *Ex parte Young* doctrine. As discussed above, federal courts may not invoke *Ex parte Young* in order to consider claims for retrospective relief or claims that seek an adjudication of the legality of past state conduct. *See Papasan,* 478 U.S. at 277-78, 106 S.Ct. 2932. The *Ex parte Young* doctrine applies only to continuing wrongs. *See id.* at 278, 106 S.Ct. 2932. Furthermore, federal courts may not invoke *Ex parte Young* to render a declaratory judgment which merely has the practical effect of adjudicating retrospective liability issues that would otherwise arise in a suit for money damages. *See Green,* 474 U.S. at 73, 106 S.Ct. 423.

On the basis of these two principles, we conclude that *Ex parte Young* cannot be invoked to preserve federal jurisdiction for that portion of the pipelines' equitable claims that seek retrospective relief. Thus, there is no federal jurisdiction to declare that the state defendants have wrongfully valued the pipelines' property in the past. And, there is no federal jurisdiction to declare that the state defendants should recertify past tax year assessments.

Both of those requests fall outside the scope of the *Ex parte Young* doctrine, and as a result, they fall squarely within the Eleventh Amendment's bar of sovereign immunity.

The only remaining claims that might lie within the *Ex parte Young* doctrine are the pipelines' request for declarations as to the state defendants' ongoing practices and the property valuations for future years. However, these claims run afoul of the doctrinal requirements of *Seminole Tribe* and *Coeur d'Alene Tribe*, and as a result, we conclude that these equitable claims also are barred by the Eleventh Amendment.

1. Prospective relief under *Seminole Tribe*.

According to *Seminole Tribe*, we must evaluate whether the equitable relief being sought under the *Ex parte Young* mechanism is broader than the relief Congress has otherwise circumscribed in relevant statutes. If so, the *Ex parte Young* mechanism for avoiding the Eleventh Amendment is not available.

Under the analysis required by *Seminole Tribe*, we find that the Tax Injunction Act, 28 U.S.C. § 1341 (1994), is the appropriate statute on which to base a comparison between the judge-made *Ex parte Young* doctrine and Congress' statutory scheme.[13] In the Tax Injunction Act Congress expressly limited the power of federal courts to issue certain types of remedies pertaining to the assess-

[13] We note that the 4-R Act is not the appropriate statute on which to make a comparison between the remedy available under *Ex parte Young* and the statutory remedies that Congress otherwise has circumscribed. In this case, the natural gas pipelines do not come within the scope of the 4-R Act because they do not possess the "rail transportation property" that is the subject of the 4-R Act. *See* 49 U.S.C. § 11501(a)(3). Hence, relief is not being sought under the 4-R Act nor does that act purport to limit the natural gas pipelines' claims asserted here under the United States Constitution.

ment, levy or collection of state taxes. Furthermore, we find that the criteria for relief under the Tax Injunction Act are significantly narrower than the criteria under *Ex parte Young*. As a result, we conclude that the *Ex parte Young* doctrine may not be invoked for the pipelines' prospective claims that seek relief that is precluded by the Tax Injunction Act.

The Tax Injunction Act provides that federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Thus, the Act clearly functions as a limitation on the equitable remedies a federal court may provide in a property tax dispute that otherwise has appropriate federal court subject-matter jurisdiction, i.e., federal question jurisdiction or diversity jurisdiction. Under the Tax Injunction Act, the only avenue by which a claim for injunctive relief against state or local taxes may be brought to federal court is where the state has failed to provide a "plain, speedy and efficient remedy." *See id.* The Act means that a state must provide a forum, according to the Supreme Court, that allows an "opportunity to raise constitutional objections" to the contested tax. *See California v. Grace Brethren Church*, 457 U.S. 393, 412 & n. 26, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982). A state remedy is "plain, speedy and efficient" if it "provides the taxpayer with a 'full hearing and judicial determination' at which [the taxpayer] may raise any and all constitutional objections to the tax." *Id.* at 411, 102 S.Ct. 2498; *see also Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981) ("On its face, the 'plain, speedy and efficient remedy' exception appears to require a state-court remedy that meets certain minimal procedural criteria."). In *Rosewell*, the Court held that the fact that the state procedure entails a two-year delay and the taxpayer may not get interest on any refund ultimately awarded does not make

the remedy inadequate. *See Rosewell,* 450 U.S. at 512, 101 S.Ct. 1221. Under the Act, if the state provides adequate procedural due process to allow a taxpayer to raise any constitutional objections, then the state has done all that is required under the Tax Injunction Act, and as a consequence, the federal courts are foreclosed from hearing such a tax challenge. *See Grace Brethren,* 457 U.S. at 412-13, 102 S.Ct. 2498.

There is no such similar limit on the scope of the *Ex parte Young* doctrine. Indeed, it appears to be clear from the concurring and dissenting opinions in *Coeur d'Alene Tribe* that an *Ex parte Young* injunction still may issue even when the state courts would provide an adequate forum for the plaintiff's constitutional claims. *See Coeur d'Alene Tribe,* 117 S.Ct. at 2045 (O'Connor, J., concurring) ("Not only do our early *Young* cases fail to rely on the absence of a state forum as a basis for jurisdiction, but we also permitted federal actions to proceed even though a state forum *was* open to hear the plaintiff's claims.") (emphasis in original); *id.* at 2057 (Souter, J., dissenting) ("The [Kennedy] opinion's notion that availability of a state forum should have some bearing on the applicability of *Ex parte Young* is . . . as much at odds with precedent as with basic jurisdictional principles."). Thus, under the *Ex parte Young* doctrine, a plaintiff still would be able to obtain prospective injunctive relief against a state official in a case where the Tax Injunction Act would bar the very same federal-court injunction because the state's remedy was "plain, speedy and efficient."

As a result, we cannot avoid the conclusion that when a state provides an adequate forum for a plaintiff's federal claims, the criteria for a remedy under *Ex parte Young* are broader than the criteria under the Tax Injunction Act.[14] On the basis of that conclusion, the rule in *Sem-*

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[14] Our conclusion on this question should not be interpreted as suggesting anything about the nature of the criteria for prospective

inole Tribe—that federal courts may not imply the judge-made remedy of *Ex parte Young* when Congress has provided a more narrowly circumscribed remedy—controls this case.[15] *See Seminole Tribe*, 116 S.Ct. at 1133. Thus, when a state provides an adequate forum to hear claims for injunctive relief against state taxes, there is no *Ex parte Young* mechanism available to avoid the Eleventh Amendment's prohibition of suits against unconsenting states.

Seeking an escape from this doctrinal logic, the pipelines allege that the *Ex parte Young* mechanism is still available for this suit because Kansas consistently has failed to provide an adequate state remedy. The district court agreed with both the conclusion and the premise of this argument. *See CIG IV*, 1996 WL 363047 at *2. We are inclined to disagree. Although the pipelines did not persuade the Kansas courts to give them the relief they sought, they did have the opportunity to raise all their constitutional claims, and in fact they availed themselves of such opportunities. An adequate state remedy only guarantees adequate due process access to the state courts; it does not guarantee victory to the taxpayer on the merits of the claims asserted. Nevertheless, we need not make a final decision as to the adequacy of Kansas' judicial procedures because the Court's decision in *Coeur d'Alene*

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injunctive relief in the opposite context when the state has failed to provide a plain, speedy, and efficient remedy. In that situation, which we do not face here, it may well be that the criteria for a remedy under *Ex parte Young* and the Tax Injunction Act are coextensive.

[15] It is worth pointing out that Congress enacted the Tax Injunction Act in part as a response to the Court's fashioning of the *Ex parte Young* remedy that allowed injunctive suits against state officials. *See Rosewell*, 450 U.S. at 522 n. 28, 101 S.Ct. 1221. Through the Tax Injunction Act, Congress intended to curtail the ability of private litigants to challenge their state tax bills in federal court through the *Ex parte Young* mechanism. *See id.*

Tribe compels the conclusion that the Eleventh Amendment bars the pipelines' suit.

2. Prospective relief under *Coeur d'Alene Tribe.*

In *Coeur d'Alene Tribe,* a majority of the justices clearly held that the *Ex parte Young* mechanism for federal-court injunctive relief is not available when the relief "implicates special sovereignty interests." *Coeur d'Alene Tribe,* —— U.S. at ——, 117 S.Ct. at 2040 (Kennedy, J., majority opinion). The Court held that the federal judiciary cannot allow "a reflexive reliance on an obvious fiction" in the *Ex parte Young* doctrine to overcome the "real limitation on a federal court's federal-question jurisdiction" that is imposed by the Eleventh Amendment. *See id.* at 2034. Thus, the crucial question in this case comes down to whether a state's power to assess and levy personal property taxes on property within its borders "implicates special sovereignty interests."

In *Coeur d'Alene Tribe,* the Court sought to answer the question of whether state ownership and regulation of submerged lands within its borders "implicates special sovereignty interests" by reviewing the doctrines of sovereignty going as far back as Justinian's *Institutes.* The Court catalogued the unique position of state sovereignty over navigable waters that then existed in the English common law and later was imported into the American legal system.

For our own purposes, we need not go so far as an inquiry into Roman law [16] because Congress has done our

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[16] We do note, however, that a state's sovereign power to tax its citizens has been a hallmark of the western legal tradition. This historical fact was clearly in the mind of the Framers when they considered the intertwining doctrines of sovereign immunity and a state's power to tax its citizens. As Alexander Hamilton explained in *The Federalist,*

> I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should

work for us. Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system. *See* Act of Aug. 21, 1937 (Tax Injunction Act), Pub.L. No. 332, 50 Stat. 738, ch. 726, § 1, (1937) (codified at 28 U.S.C. § 1341); *see also* S. Rep. 1035, 75th Cong., at 2 (1937) (noting that the Tax Injunction Act was intended to protect states from well-financed litigants who could "seriously disrupt State and county finances" by withholding tax payments during the course of federal-court litigation). As the Supreme Court explained in *Rosewell,* the Tax Injunction Act "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell,* 450 U.S. at 522. The statute had its roots in Congress' recognition of "the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.,* 429 U.S. 68, 73, 97 S.Ct. 219, 50 L.Ed.2d 227 (1976). We do not doubt, therefore, that a state's interests in the integrity of its property tax system lie at the core of the state's sovereignty. Indeed, where it is possible to imagine a state government continuing to maintain its sovereignty despite the lack of any ownership

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possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

The Federalist, No. 32 (A.Hamilton). This view of the singular importance of tax administration for the states recently was reiterated by the Court: "We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n,* 515 U.S. 582, 586, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995).

of land, *cf. Coeur d'Alene Tribe*, 117 S.Ct. at 2041, it is impossible to imagine that a state government could continue to exist without the power to tax.

Furthermore, we have no hesitation in concluding that the declaratory relief requested by the pipelines—i.e., that the state of Kansas should "recertify" its tax assessment of the pipelines' personal property in Kansas—is "fully as intrusive" into the state's sovereignty as would be a retroactive money judgment against excessive property taxes.[17] *See id.* at 2043. The pipelines' request to rewrite Kansas' property tax code with respect to its application against the personal property of natural gas pipelines is certainly a major intrusion into Kansas' special sovereignty interests. The Eleventh Amendment stands as a barrier to such a request. The Eleventh Amendment requires that the pipelines' claims against the state of Kansas must be brought in state court.

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[17] The pipelines vehemently argue that their requested relief will not impose a drain on the treasury of the state of Kansas because the property taxes actually are collected and retained by the local counties. They further affirmatively waive any claim in their suit that might be interpreted as a request for money damages against the state. It appears, however, that a portion of the property taxes collected by the counties are passed along to the state to fund some state education programs, and the state defendants contend that this fact means the pipelines are requesting a money judgment against the state.

Despite the vigor of the parties' argument on this issue, we need not determine the particular downstream location of the disputed property tax revenues. The question under *Coeur d'Alene Tribe* is not whether a plaintiff's requested relief actually constitutes a call on the state treasury, but rather whether the requested relief is the "functional equivalent" of some form of legal relief that would be barred by the Eleventh Amendment. *See Coeur d'Alene Tribe*, 117 S.Ct. at 2040. We believe that a request to "recertify" property tax assessments actually is the "functional equivalent" of a money judgment against the state and it intrudes on the state's special sovereignty interests.

The pipelines argue that it would be the height of injustice to require them to bring their federal constitutional claims in the state courts of Kansas when one of their claims is that Kansas has failed to provide the pipelines with minimal guarantees of procedural due process. Although we recognize the predicament the pipelines face, we are constrained by the Eleventh Amendment and the special sovereignty interest a state has in the control of its property tax system. The Supreme Court has held that in cases implicating the core powers of a state qua state, the Eleventh Amendment directs a litigant to the state's courts. Of course, a litigant always may seek review of the state court decisions by the U.S. Supreme Court through a petition for certiorari. *See* 28 U.S.C. § 1257. As lower federal courts, however, this court and the federal district court in Kansas may not entertain the pipeline's suit ultimately seeking federal declaratory relief against the tax policy of the state of Kansas. The relief sought by the pipelines impermissibly intrudes upon Kansas' "dignity and status" as a sovereign government.

II. The state defendants' additional claims.

In addition to its holding under the *Ex parte Young* doctrine, the district court rejected the state defendants' other arguments against federal jurisdiction. The court held that the pipelines' suit was not barred by either the Tax Injunction Act or the *Rooker/Feldman* doctrine. *See CIG IV*, 1996 WL 363047, at *2, *3 (Aplt.App. at 215, 216-17). In light of our conclusion that the Eleventh Amendment extends the sovereign immunity of the state of Kansas as a bar against the pipelines' suit, we need not address these other issues. Instead, we must simply vacate the district court's decision. *See Aaron v. Kansas*, 115 F.3d 813, 818 (10th Cir.1997) (vacating the district court's judgment after concluding that the Eleventh Amendment barred federal jurisdiction in the case).

Conclusion

In the interests of judicial economy, we hereby CONSOLIDATE these two appeals, and we GRANT the appellees' motion to dismiss the named Kansas state agencies as defendants and to dismiss their state-law claims based on the Kansas Constitution and Kansas common law.

Furthermore, relying on the jurisdictional bar imposed by the Eleventh Amendment, we conclude that these appeals must be DISMISSED, the judgment of the district court VACATED, and the case REMANDED to the district court with instructions to dismiss all claims against the remaining state defendants in this case.

APPENDIX B

UNITED STATES DISTRICT COURT
D. KANSAS

No. 96-1089-JTM

ANR PIPELINE COMPANY; and COLORADO INTERSTATE GAS COMPANY,
Plaintiffs,

v.

JOHN D. LAFAVER, *et al.*,
Defendants.

June 26, 1996

MEMORANDUM AND ORDER

MARTEN, District Judge.

The present case arises from the challenge by plaintiffs ANR Pipeline Company and Colorado Interstate Gas Company to the system of property taxation in Kansas, under which railroads are given an 80% exemption from taxation, while natural gas pipelines—such as the plaintiffs—are denied a similar exemption. The pipelines contend the denial of the exemption violates state and federal guarantees of equal protection and treatment of similarly situated taxpayers. The matter is currently before the court on the state defendants' motion to dismiss, which has been joined by many of the county defendants.

The pipelines initially challenged assessments for tax years 1990, 1991, 1992 and 1993 before the Kansas

Department of Revenue's Director of Property Valuation and the Kansas Board of Tax Appeals. These assessments were reached following a 1989 settlement agreement, under which 80% of railroad property was exempted, and the remainder taxed at a reduced rate. Each action by the pipelines was subsequently consolidated into one of two appeals. The parties entered stipulations of fact as to all claims except that for 1993.

The Director premised the preferential treatment of railroads on the effect of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503 (1988), popularly known as the 4-R Act, which is designed to prevent states from imposing discriminatory taxation of railroads, and to revitalize the national railroad system. The Board of Tax Appeals upheld these conclusions against the plaintiffs' claims that the differential taxation violated the equal protection guarantees of the state and federal constitutions, as well as the Commerce Clause of the United States Constitution.

With regard to the consolidated appeal of the 1990 and 1991 claims, the Kansas Supreme Court affirmed the Board's decision in *In re Tax Appeal of ANR Pipeline*, 254 Kan. 534, 866 P.2d 1060 (1994). The court affirmed the BOTA rulings, finding the 4-R Act preempted requirements of equal treatment among public utilities. As a result, the state was compelled to grant railroads advantages in both the amount of property exempted from taxation and a lower tax rate. The court found:

> In the case before us, the 4-R Act placed limitations on state taxation of railroad property. Railroad property had to be treated the same as "other commercial and industrial property." There can be little doubt that this is a preemption. If it is not a preemption, the 4-R Act is just a piece of paper suggesting railroads should be treated like other commercial and industrial property and the enforcement section

> thereof is surplusage. Clearly, that was not the congressional intent in enacting the 4-R Act.

254 Kan. at 543.

Three days after this decision, the United States Supreme Court ruled in *Oregon Rev. Dept.* v. *ACF Industries,* 127 L.Ed.2d 165 (1994), the 4-R Act did not create in favor of railroads any entitlement to exemption from ad valorem taxation.[1]

The pipelines filed a timely motion for reconsideration with the Kansas Supreme Court, which was summarily denied. The United States Supreme Court later denied the pipelines' petition for certiorari.

The pipelines' consolidated 1992-1993 appeal was subsequently denied by the Board of Tax Appeals. On appeal, the Kansas Supreme Court conceded that its earlier ruling in ANR Pipeline was no longer controlling in light of the Supreme Court's decision in *ACF Industries. In re Tax Appeal of Colorado Interstate Gas,* 258 Kan. 310, 903 P.2d 154 (1995). However, the Supreme Court upheld the Board's ultimate conclusion that the pipelines were not entitled to relief. The court premised this conclusion on the finding that the preferential exemption was the result of "negotiated settlements between . . . the named railroads and the State through the [Director of Property Valuation]." 258 Kan. at 316.

The court then remanded the 1993 claim to the Board of Tax Appeals solely for factual findings. The pipelines' constitutional arguments were dismissed without discussion.

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[1] The Supreme Court's decision only addresses the 4-R Act's impact on differential exemptions from taxation; it does not address the issue of different and preferential tax rates. Accordingly, the pipelines' suit here is restricted to the contention that they did not receive a hearing on the exemption issue.

The major thrust of the brief in support of the motion to dismiss filed by the state agency defendants is that the court is without jurisdiction to hear the matter pursuant to the Tax Injunction Act, 28 U.S.C. § 1341 (1993) ("Act"). The Act is designed to prevent federal courts from exercising jurisdiction over matters of state taxation. See *In re Dep't of Energy Stripper Well Exemption Litig.*, 739 F.Supp. 1449 (D.Kan.1990), *aff'd*, 968 F.2d 27 (1992). In addition to the Act, principles of comity may prohibit federal courts from hearing actions for damages based upon alleged unconstitutional taxation. *Fair Assessment in Real Estate* v. *McNary*, 454 U.S. 100, 116 (1981).

The Act, however, is not a bar to jurisdiction where state law fails to provide "a plain, speedy, and efficient remedy" in the courts of that state. 28 U.S.C. § 1341. See *Roswell* v. *LaSalle National Bank*, 450 U.S. 503 (1981); *Finizie* v. *City of Bridgeport*, 880 F.Supp. 89 (D.Conn.1995).

The defendants cite a number of cases in which the bar of the Tax Injunction Act was applied to litigants who had either failed to complete or had never even attempted to pursue all avenues of state relief, see, *e.g.*, *Northern Natural Gas* v. *Wilson*, 340 F.Supp. 1126 (D. Kan.1971), *aff'd*, 405 U.S. 949 (1972), and cite to the numerous rules providing for state procedures in tax appeal cases. Neither source of authority is controlling here. The pipelines consistently attempted to protect their rights under state law, yet in the end their constitutional claims were essentially terminated without any consideration. The fact that procedures exist provides little assistance, and thus no bar under the Tax Injunction Act, if the procedures are ignored in fact.

The defendants' Eleventh Amendment argument must also be dismissed, consistent with the exception to such immunity identified in *Ex Parte Young*, 209 U.S. 123

(1908). Of course, *Ex Parte Young* will not apply where the suit seeks to compel a state official to perform a discretionary act or is in reality a suit against a state. But here, the pipelines' action does not seek to compel the defendants to perform a discretionary action; compliance with the constitutional guarantees of Kansas and the United States is not discretionary.

Nor is the action for damages an action against the state, but rather, is against individual counties and their treasurers. Under Kansas law, counties are independent corporate entities with broad home rule powers, including the power to tax. K.S.A. 19-101, 19-117. In their answer to the cross-claim, the state defendants assert counties are not

> mere ministerial agents of the [state], but are directly responsible for setting the tax levy used to impose taxes on plaintiffs' property [and] expended the taxes collected from the plaintiffs as a result of the tax levy they imposed on the plaintiff's property.

(Defs.' Answer to Cross-Claim at 2 (emphasis added).)

Finally, the defendants contend the present action must be dismissed as an invalid collateral attack on a state appellate court decision, invoking what is known as the Rooker-Feldman doctrine. See *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). However, the present matter is not a collateral action directed at the merits of the decisions of the Kansas court, but is an original action premised on the failure of the court to decide the constitutional issues raised by the pipelines.

The court also has at hand the plaintiffs' motion for leave to file an amended complaint adding a claim under the Commerce Clause. On March 21, 1996, the Board of Tax Appeals refused to consider the pipelines' Commerce Clause arguments relating to tax years 1993, 1994

and 1995, holding the issue of the Commerce Clause was not before it since it had not been remanded by the Supreme Court. The court finds the interests of justice support the filing of the amended complaint.

IT IS ACCORDINGLY ORDERED this 25th day of June, 1996, that the motion to dismiss of the state agencies (Dkt. No. 68), as well as those of the various county defendants (Dkt. Nos. 80, 97, 100, 107, 108, 110, 114 & 115) are hereby denied; the motion for leave to file an amended complaint (Dkt. No. 127) is hereby granted.

APPENDIX C

[Filed Sep. 6, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 96-1089-JTM

ANR PIPELINE COMPANY, *et al.*,
Plaintiffs,

vs.

JOHN D. LAFAVER, *et al.*,
Defendants.

MEMORANDUM ORDER

Two motions are currently before the court. In the first, the defendants seek reconsideration of the court's order of June 26, 1996. A motion to reconsider, alter or amend under Fed.R.Civ.P. 59(e) may be granted to correct manifest errors of fact or law, or in light of newly discovered evidence, but reconsideration is appropriate only if the court has obviously misapprehended a party's position, the facts, or applicable law; has mistakenly decided issues not presented for determination; or the moving party produces new evidence which it could not have obtained through the exercise of due diligence. *Anderson v. United Auto Workers*, 738 F.Supp. 441, 442 (D. Kan. 1989). *Refrigeration Sales v. Mitchell-Jackson, Inc.*, 605 F.Supp. 6, 7 (N.D. Ill. 1983), *aff'd*, 770 F.2d 98 (7th Cir. 1985).

A motion to reconsider is not "a second chance for [the] losing party to make its strongest case or to dress

up arguments that previously failed." *Voelkel v. GMC*, 846 F.Supp. 1482 (D. Kan.), *aff'd*, 43 F.3d 1484 (10th Cir. 1994). The resolution of the motion is committed to the sound discretion of the court. *Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1395 (10th Cir. 1988). The court has reviewed the arguments submitted by defendants and finds no justification for granting the motion to reconsider.

The defendants also have moved to amend the June 26 order, an amendment which would satisfy the requirements of 28 U.S.C. § 1292(b) and allow interlocutory appellate consideration of all potentially dispositive issues in the case. The court finds that the circumstances governing appeals under § 1292(b) are present here, and that appellate resolution of these issues will advance the interests of justice.

IT IS ACCORDINGLY ORDERED this 6th day of September, that the defendants' motion to reconsider (Dkt. No. 143) is denied; the motion to amend [Dkt. No. 138] is granted.

/s/ J. Thomas Marten
J. THOMAS MARTEN
Judge

APPENDIX D

IN THE DISTRICT COURT
OF SHAWNEE COUNTY, KANSAS
SECOND DIVISION

Case No. 92-CV-1052

COLORADO INTERSTATE GAS COMPANY
and ANR PIPELINE COMPANY,
Plaintiffs,

vs.

MARK BESHEARS,
Secretary of Revenue, *et al.*,
Defendants.

MEMORANDUM DECISION AND ORDER

The captioned action is brought by the plaintiffs who contend that in August of 1989, the defendant, Secretary of Revenue of the State of Kansas, entered into a consent decree in the United States District Court for the District of Kansas in a case entitled *Burlington Northern Railroad Company, et al. v. Ed C. Rolfs, Secretary of Revenue of the State of Kansas, et al.*, 89-4124-R, in which the plaintiff railroads were granted certain property tax relief for the year 1989 and subsequent years. The plaintiffs in the instant case contend that they are public utilities and are entitled to uniform and equal taxation with the railroads which are also public utilities under Kansas law. The plaintiffs assert that the actions taken in the Federal Court violate the federal and state constitutions and they seek injunctive relief and to recover property taxes previously paid.

The defendants have filed a Motion to Dismiss this action, asserting that plaintiffs have failed to exhaust

their administrative remedies provided by law. The defendants acknowledge that they presently have pending before the Board of Tax Appeals appeals concerning their 1990 and 1991 property taxes, however, plaintiffs contend that they have no remedy concerning property taxes paid for the year 1989 because the Federal Court action was taken after their appeal period expired in 1989. Plaintiffs have filed a Motion to Stay this proceeding pending the decision of the Board of Tax Appeals concerning the years 1990 and 1991. On September 21, 1992, the Court heard the oral arguments of counsel concerning these Motions and they were taken under advisement pending the receipt of briefs from counsel. The briefs of counsel have been received and reviewed and the Motions are now ready for decision.

FINDINGS OF FACT

After reviewing the briefs of counsel, it appears that the factual background stated above contains the facts which are essential to a decision on the pending Motions and that there is no controversy concerning the operative facts.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the following are the Court's conclusions of law:

1. Public utilities are valued and assessed by the Director of Property Valuation in accordance with K.S.A. 79-5a04 and K.S.A. 79-5a25. If aggrieved by its assessed valuation, a public utility may file a request for an informal conference in accordance with K.S.A. 79-5a05 which sets out the procedure for review by the Director of Property Valuation.

2. The decision of the Director of Property Valuation may be appealed to the State Board of Tax Appeals by filing a notice within thirty days as provided by K.S.A. 74-2438.

3. K.S.A. 74-2426 provides in substance that the decisions of the Board of Tax Appeals are reviewable by the district courts in accordance with the Act for Judicial Review and Civil Enforcement of Agency Actions except that Section (c)(3) of K.S.A. 74-2426 provides that the Court of Appeals has exclusive jurisdiction of any action for review pertaining to property appraised and assessed by the Director of Property Valuation or excise, income or inheritance taxes assessed by the Director of Taxation.

4. Because the plaintiffs have admittedly not exhausted their administrative remedies concerning the tax years 1990 and 1991, this Court has no subject matter jurisdiction to consider the claims raised by the plaintiff concerning those tax years.

5. Because the plaintiffs failed to file within thirty days a Notice of Appeal to the Board of Tax Appeals concerning their 1989 assessed valuation, they failed to exhaust the administrative remedies available to them concerning the 1989 tax year and this Court has no subject matter jurisdiction to consider plaintiffs' claims concerning that year.

RATIONALE

The doctrine of exhaustion of administrative remedies is a well-settled rule in Kansas law. The exhaustion of administrative remedies is required in property tax matters before a taxpayer may seek review of property tax matters in court. *Tri-County Public Airport Authority v. Board of Morris County Commissioners,* 233 Kan. 960, 666 P.2d 698 (1983); *In Re K-Mart Corp.,* 232 Kan. 387, 654 P.2d 470 (1982); *Wray v. State Department of Revenue,* 224 Kan. 234, 579 P.2d 717 (1978).

A failure to exhaust administrative remedies deprives the Court of subject matter jurisdiction in tax relief cases where a complete and adequate administrative remedy exists. *Zarda v. State,* 250 Kan. 364, 826 P.2d 1365, cert. denied —— U.S. ——, 119 L.Ed. 2d 566, 112

S. Ct. 2941 (1992); *Dean v. State,* 250 Kan. 417, 826 P.2d 1372, cert. denied, 119 L.Ed 2d 566, 112 S. Ct. 2941 (1992); *Farmers Banshares of Abilene, Inc. v. Graves,* 250 Kan. 520, 826 P.2d 1363 (1992).

The plaintiffs contends that they have exhausted all available administrative remedies concerning the tax year 1989 because their complaint did not arise until August 11, 1989, upon the entry of a consent decree in the United States District Court resolving a valuation and assessment appeal filed by various railroads. At that time, the plaintiffs' time to appeal their assessment by the Director of Property Valuation to the Board of Tax Appeals had expired. Plaintiffs contends that they now have no administrative remedy concerning that tax year. This contention is correct, however, it does not follow that this Court now has jurisdiction to entertain the plaintiffs' claim concerning the tax year 1989.

The Kansas Supreme Court has repeatedly held that the time for taking an administrative appeal as prescribed by statute is jurisdictional and delay beyond the statutory time is fatal. *Lakewood Village, Inc. v. Board of Johnson County Commissioners,* 232 Kan. 711, 659 P.2d 187 (1983); *Vaughn v. Martell,* 226 Kan. 658, 603 P.2d 191 (1979). The law in Kansas is well-settled that administrative appeals from taxing agencies are matters of statute and the right to appeal is specifically limited to the statute providing for the appeal. *Sprague Oil Service v. Fadely,* 189 Kan. 23, 367 P.2d 56 (1961).

The facts in the case of *State ex rel. Smith v. Miller,* 239 Kan. 187, 718 P.2d 1298 (1986), are somewhat analogous to those in the case at bar. In that case, the Supreme Court found that the underlying issue was that the appellant complained that ad valorem tax assessments placed upon certain real estate was too high. The Supreme Court observed at page 190:

> "Although appellant asserts the unconstitutionality of the statutes and seeks extraordinary relief, its

obvious complaint is that the assessed valuation of its real property is too high. This is an issue that must be determined by exhaustion of administrative remedies before resorting to the courts."

The failure of the plaintiffs in this case to appeal the assessed valuation on their property for the year 1989 effectively deprives this court of jurisdiction to hear the plaintiffs' claims concerning that year. It should be noted that the plaintiffs apparently took no action in the Federal Court to contest the decision about which they now complain and it must also be noted that exclusive jurisdiction to review appeals pertaining to property appraised and assessed by the Director of Property Valuation is vested in the Court of Appeals by K.S.A. 74-2426(c)(3).

For the foregoing reasons, it is the decision of the Court that this Court lacks subject matter jurisdiction to hear the claims of the plaintiff asserted in this case and the Court is powerless to stay the proceeding as requested in the plaintiffs' Motion. The plaintiffs' Motion to Stay the Proceeding is overruled. The defendants' Motion to Dismiss for lack of subject matter jurisdiction in accordance with K.S.A. 60-212(b) is sustained and the action is dismissed with the costs taxed to the plaintiffs.

The original of this Memorandum Decision and Order is being filed with the Clerk and shall constitute the entry of the Court's judgment. No further Journal Entry is necessary.

Dated this 25th day of January, 1993.

/s/ Fred S. Jackson
FRED S. JACKSON
District Judge

APPENDIX E

COURT OF APPEALS OF KANSAS

Nos. 69,322, 69,323 and 69,442

COLORADO INTERSTATE GAS COMPANY and
ANR PIPELINE COMPANY,
Appellants,

v.

MARK BESHEARS,
Secretary of Revenue, *et al.*,
Appellees.

Sept. 24, 1993

Before ELLIOTT, P.J., GREEN, J., and CARLOS MURGUIA, District Judge.

GREEN, Judge:

This is a consolidated appeal. ANR Pipeline Company (ANR) and Colorado Interstate Gas Company (CIG) (collectively referred to as appellants or pipelines) appeal the decisions of the Board of Tax Appeals (BOTA) and the district court. Both BOTA and the district court have dismissed appellants' claim because of a lack of jurisdiction. The pipelines argue the denial of a review of their claims is a denial of their due process rights.

In order to properly understand the jurisdictional issues presented in this case, a brief overview of the appellants' underlying claim is necessary. Pursuant to K.S.A. 79-

5a01, railroad and pipeline corporations are deemed public utilities for the purposes of valuation and assessment of ad valorem taxes. In a federal consent decree dated August 11, 1989, railroads were given much more favorable tax treatment. The consent decree was the result of a settlement reached between BOTA and certain railroads on a legal challenge to their 1989 assessment based on the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (1988). In this case, the pipelines have filed suit, claiming their disparate treatment for the tax year 1989 violated the Kansas Constitution. The pipelines contend Article 11, § 1 of the Kansas Constitution requires uniform and equal treatment for members of the same class for taxation purposes.

We note the pipelines have a separate appeal on this same claim for the tax years 1990 and 1991 pending before our Supreme Court (case No. 69,116).

The pipelines argue a denial of a hearing by both BOTA and the district court is a violation of their rights under the Due Process Clause of the Kansas and United States Constitutions.

Procedural due process requires a right to a fair trial in a fair tribunal. *State v. Green,* 245 Kan. 398, 404, 781 P.2d 678 (1989). The constitutional requirements of due process are satisfied where the taxpayer, at some stage of the assessment procedures, has an opportunity to appear and contest the assessment. *Shields Oil Producers, Inc. v. County of Russell,* 229 Kan. 579, 582, 629 P.2d 152 (1981). Currently, a public utility's right to appeal its assessment is governed by K.S.A. 79-5a05 and K.S.A. 74-2438.

K.S.A. 79-5a05 provides in pertinent part:

> "Before the assessed valuation of public utility property is finally determined, the director of property valuation shall cause to be sent to each public utility a statement of the appraised valuation of the utility's property. The determination contained in

> such statement shall not require an adjudicative proceeding under the Kansas administrative procedure act. The statement shall inform the public utility of the right to an informal conference as provided in this section. The failure to request an informal conference shall not preclude any appeal under K.S.A. 74-2438 and amendments thereto. If a public utility has any objection to the statement as issued, the public utility shall, within 15 days of the date of mailing of such statement, notify the director in writing of such objection."

A statement of valuation was sent to CIG on May 11, 1989, and a statement of valuation was sent to ANR on May 30, 1989. Neither pipelinne objected to the Director of Property Valuation's (PVD) assessed valuations.

K.S.A. 74-2438 provides in pertinent part:

> "An appeal may be taken to the state board of tax appeals from any finding, ruling, order, decision, or other final action on any case of the director of taxation or director of property valuation by any person aggrieved thereby. Notice of such appeal shall be filed with the secretary of the board within 30 days after such finding, ruling, order, decision or other action on a case, and a copy served upon the director concerned."

The pipelines concede they failed to follow the statutory procedures outlined above. However, they contend the action which gave rise to their claims did not occur until August 11, 1989. On that date, the PVD and the railroads entered into a consent decree giving railroads more favorable tax treatment than pipelines. The pipelines contend BOTA had authority to entertain their claims pursuant to K.S.A. 79-1702. They also contend the district court had power to entertain their case because of the constitutional challenge involved.

A. Authority of BOTA to hear the pipelines' claims pursuant to K.S.A. 79-1702.

K.S.A. 79-1702 in pertinent part provides:

> "If any taxpayer or any municipality or taxing district shall have a grievance not remediable under the provisions of K.S.A. 79-1701 or 79-1701a, and amendments thereto, . . . such grievance may be presented to the state board of tax appeals and if it shall be satisfied from competent evidence produced that there is a real grievance, it may direct that the same be remedied either by canceling the tax, if uncollected, together with all penalties charged thereon, or if the tax has been paid, by ordering a refund of the amount found to have been unlawfully charged and collected.
>
> . . . .
>
> "Errors committed in the valuation and assessment process that are not specifically enumerated in K.S.A. 79-1701, and amendments thereto, shall be remediable only under the provisions of K.S.A. 79-2005, and amendments thereto."

The pipelines contend K.S.A. 79-1702 is a catch-all provision which provides remedies for grievances not otherwise remediable. According to the pipelines, their claim of discriminatory application of assessments falls within that description.

In its order denying rehearing, BOTA stated:

> "The Board notes that the issue before it is a valuation and assessment issue. The issue is one of appraisal judgment and discretion. This is not a clerical type error or an error made by a county official remediable under K.S.A. 79-1702. K.S.A. 79-1702 is not intended to provide relief for state assessed property nor is it intended to provide relief in valuation issues. The applicant's only venue for

relief for this particular valuation issue is to first appeal in a timely manner to the Director of Property Valuation. The applicant failed to follow the proper procedures and the Board is without authority to hear the case. All procedures set forth in K.S.A. 79-5a05 and K.S.A. 74-2438 must be followed exactly or the Board is without authority to hear the case and must dismiss it for lack of jurisdiction. See *Vaughn v. Martell,* 226 Kan. 658 [603 P.2d 191] (1979). The Board, therefore, has no recourse but to dismiss the applicant's grievance for lack of jurisdiction. The order as originally issued is sustained and the request for rehearing must be denied."

The pipelines argue that BOTA's ruling is wrong because it mischaracterizes the issue and the scope of K.S.A. 79-1702. First, the pipelines contend the issue is not one of appraisal. The issue, according to the pipelines, is the PVD's discriminatory implementation of the ad valorem taxation system. However, the pipelines misunderstand BOTA's order denying a rehearing. In denying the rehearing, BOTA determined the issue in this case is one of valuation and assessment, which encompasses the more specific question of the PVD's discriminatory implementation.

The pipelines next contend that BOTA incorrectly determined the scope of K.S.A. 79-1702. BOTA's interpretation of K.S.A. 79-1702 appears to limit relief to clerical type error made to county assessed property.

To support their argument that K.S.A. 79-1702 is not limited to county assessed property, the pipelines cite three cases where, under the proper circumstances, the statute has been used by state assessed taxpayers. However, a closer examination of each case shows the pipelines' reliance is misplaced.

In *Felten Truck Line v. State Board of Tax Appeals,* 183 Kan. 287, 293, 327 P.2d 836 (1958), the court held

G.S. 1949, 79-1702 (now K.S.A. 79-1702) was available to the appellants to challenge the state commission of revenue and taxation's assessment of their property and other acts of the commission in applying the motor carrier tax statutes, G.S. 1949, 79-6a01 *et seq.* (1955 Supp.). However, this statement is no longer a correct statement of the law. Prior to certain amendments in 1959, motor carriers' only means of challenging the tax assessment of the commission was either under G.S. 1949, 79-1702 or injunctive relief under G.S. 1949, 60-1121 (now K.S.A. 60-907[a]). In 1959, 79-6a04 was amended to permit a direct appeal identical to the process now available in K.S.A. 79-5a04. See L.1959, ch. 369, § 4. K.S.A. 60-907(a) is not applicable in this case because the pipelines did not seek injunctive relief until August 1992, well after the property tax had been levied, assessed, and collected.

The other two cases cited do not address the applicability of 79-1702. In *Panhandle Eastern Pipe Line Co. v. Fadely*, 189 Kan. 283, 285, 369 P.2d 356 (1962), the court approved BOTA's determination that it "has no authority to order a refund under G.S. 1949, 79-1702, of an excise tax, and that the only authority which said Board has under this statute is in regard to ad valorem tax." Clearly, this statement, cannot be used to say K.S.A. 79-1702 was meant to cover property assessed by the PVD.

Finally, in *Northern Natural Gas Co. v. Bender*, 208 Kan. 135, 142-43, 490 P.2d 399 (1971), *cert. denied* 406 U.S. 967, 92 S.Ct. 2408, 32 L.Ed.2d 665 (1972), the court refused to speculate whether, under 79-1702, BOTA could provide a state assessed interstate pipeline effective relief. The court refused to apply 79-1702 because the appellant had not exhausted its administrative remedies under the direct appeal procedure of K.S.A. 74-2426. Therefore, the three aforementioned cases cited by the pipelines have failed to establish a clear legal precedent that K.S.A. 79-1702 is available to challenge an assessment made by the PVD.

Next, the pipelines contend the plain language of K.S.A. 79-1702 provides that "any taxpayer" may present a grievance to BOTA. However, this argument overstates BOTA's jurisdiction to hear grievances under K.S.A. 79-1702. In order for BOTA to have jurisdiction under K.S.A. 79-1702, the grievance must not be remediable under K.S.A. 79-1701 (clerical errors) or K.S.A. 1992 Supp. 79-2005 (errors in valuation and assessment not specifically listed in 79-1701).

In this case, the pipelines have shown the remedies under K.S.A. 79-1701 and K.S.A. 1992 Supp. 79-2005 are not available to them. Furthermore, the pipelines concede their complaint is not one of the eight clerical errors listed in K.S.A. 79-1701. Moreover, K.S.A. 1992 Supp. 79-2005 "shall not apply to the valuation and assessment of property assessed by the [PVD]." K.S.A. 1992 Supp. 79-2005(n). Therefore, the pipelines argue, K.S.A. 79-1702 is available to them. However, the analysis does not end here.

BOTA contends K.S.A. 79-1702 is only available for correction of clerical errors made in the appraisal, assessment, and tax rolls of a county. In support of its argument, BOTA contends the Kansas Legislature amended K.S.A. 79-1702 in 1980 to provide: "Errors committed in the valuation and assessment process that are not specifically enumerated in K.S.A. 79-1701 shall be remediable only under the provisions of K.S.A. 79-2005. . . ." L.1980, ch. 311, § 2. At the same time, the Kansas Legislature excluded state assessed property from appeal under K.S.A. 79-2005. L.1980, ch. 315, § 1. Therefore, BOTA contends the legislature must have intended K.S.A. 79-5a05 and 74-2438 to be the exclusive method of appeal for a state assessed public utility.

Unfortunately, no court has had an occasion to interpret the amendment and the scope of BOTA's jurisdiction under K.S.A. 79-1702 in light of the 1980 amendment.

The pipelines rely on *Wirt v. Esrey*, 233 Kan. 300, 662 P.2d 1238 (1983), to support their proposition that K.S.A. 79-1702 gives BOTA jurisdiction to grant taxpayers relief for tax assessment complaints not otherwise remediable. In *Wirt*, the taxpayer was given a refund by BOTA for taxes paid under protest because of an improper valuation of its property by Johnston County. However, *Wirt* is not controlling in this case because as the court noted, "K.S.A. 79-1702 has been amended to effectively eliminate a taxpayer's use of this statute when concerning errors in valuation and assessment." 233 Kan. at 317, 662 P.2d 1238.

Further, in *Northern Natural Gas*, 208 Kan. 135, 490 P.2d 399, addressing the application of 79-2005 to challenge the validity of a state assessment of public utilities, the court held: "[W]here property has been assessed by the Director on a statewide basis, the method of review outlined in 74-2426 is exclusive, and the assessment may not be challenged collaterally under 79-2005. Otherwise, not only might confusion, delay and harassment result, but multiplicity of actions, abhorred in the law, might attend as well." 208 Kan. at 140, 490 P.2d 399.

This rationale is also persuasive as to whether K.S.A. 79-1702 is available to state assessed public utilities for collateral challenge to the PVD implementation of the ad valorem tax on state assessed public utilities. The legislature has expressed its clear intent that K.S.A. 74-2438 is the exclusive method for a public utility to challenge the PVD's assessment and valuation of propery. Finally, to permit collateral challenge under K.S.A. 79-1702 would surely lead to confusion and delay.

Therefore, for the reasons stated above, BOTA did not err in finding K.S.A. 79-1702 was not available to the pipelines.

B. District court power to hear the pipelines' constitutional challenge.

The pipelines argue the district court erred in dismissing their case for a failure to exhaust administrative remedies for the tax years 1989, 1990, and 1991. The pipelines contend that for the 1989 tax year they could not have exhausted an administrative remedy because no administrative remedy was available by the time the basis for their appeal accrued. The pipelines also contend their actions for the tax years 1990 and 1991 should have been stayed pending a determination of the issue of jurisdiction.

In summarizing the doctrine of exhaustion of administrative remedies, the court has stated:

> "K.S.A. 77-612 provides, in pertinent part, as follows: 'A person may file a petition for judicial review under this act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review.' This court has stated the rule in less rigid terms: 'The well-recognized rule in this state is that where a full and *adequate* administrative remedy is provided in tax matters by statute, such remedy must *ordinarily* be exhausted before a litigant may resort to the courts.' (Emphasis added.) *State ex rel. Smith v. Miller*, 239 Kan. 187, Syl. ¶ 1, 718 P.2d 1298 (1986).
>
> . . . .
>
> ". . . The purpose to be served by requiring exhaustion of administrative remedies and the relative functions of the administrative agency and the judiciary were stated by this court in *Jenkins v. Newman Memorial County Hospital*, 212 Kan. 92, 95, 510 P.2d 132 (1973): 'The doctrine of exhaustion of administrative remedies is directed toward promoting

> proper relationships between the courts and administrative agencies charged with particular administrative and regulatory duties. It promotes orderly procedure and requires a party to exhaust the administrative sifting process with respect to matters peculiarly within the competence of the agency.'
>
> In the realm of taxes, matters of assessment, exemption, equalization, and valuation are administrative in character. See *Symns v. Graves,* 65 Kan. 628, 636, 70 Pac. 591 (1902). Under Kansas law, it would be unwarranted for a court to entertain a tax suit on any of these matters of administrative expertise where administrative remedies had not been pursued." *Dean v. State,* 250 Kan. 417, 420-21, 826 P.2d 1372 (1992).

See *J. Enterprises, Inc. v. Board of Harvey County Comm'rs,* 253 Kan. 552, 857 P.2d 666 (1993), for a thorough discussion of the exhaustion doctrine.

However, the law recognizes certain exceptions to the exhaustion doctrine. "If no administrative remedy is available or if it is inadequate to address the problem at issue, exhaustion is not required." *Vann v. Employment Security Bd. of Review,* 12 Kan.App.2d 778, Syl. ¶ 1, 756 P.2d 1107 (1988). Similarly, the ultimate power to determine the constitutionality of any agency action rests with the courts. "Where there are no issues raised which lend themselves to administrative determination and the only issues present . . . require judicial determination . . ., it follows that plaintiffs should be permitted to seek court relief without first presenting the case to the administrative agency." *Zarda v. State,* 250 Kan. 364, 368-69, 826 P.2d 1365 (1992).

In this case, the pipelines claim the PVD's settlement with the railroads creates disparate tax treatment in violation of the uniform and equal tax provisions of the Kan-

sas Constitution. For the tax year of 1989, the district court correctly observed that the pipelines had no administrative remedy. Still, the district court dismissed the case for failure to exhaust administrative remedies, thereby leaving the pipelines with no means of seeking judicial review of the actions of the PVD.

In cases where constitutional questions are in issue, the availability of judicial review is presumed, and a statutory scheme should not be read to take the extraordinary step of foreclosing jurisdiction unless the legislature's intent to do so is manifested by clear and convincing evidence. *Califano v. Sanders*, 430 U.S. 99, 109, 97 S.Ct. 980, 986, 51 L.Ed.2d 192 (1977).

We have reviewed K.S.A. 74-2426 and find no intent by the legislature to preclude constitutional challenges. Therefore, we reverse the district court's dismissal of the appellants' case concerning the 1989 tax year.

Further, we note the district court should determine whether the pipelines have presented a constitutional claim which is at least colorable. *Koerpel v. Heckler*, 797 F.2d 858, 863 (10th Cir.1986). Our review is not on the merits of the constitutional claim of the pipelines; however, we have presumed their constitutional claim is colorable for the purposes of determining jurisdiction.

Finally, the pipelines concede the tax years of 1990 and 1991 are the subject of an appeal before the Kansas Supreme Court. Therefore, the district court should stay any proceedings on these tax years pending a determination by the Supreme Court.

We affirm the BOTA orders denying jurisdiction to entertain the pipelines' 1989 claims. We reverse and remand to the district court with directions to proceed in accordance with this opinion.

APPENDIX F

SUPREME COURT OF KANSAS

No. 69116

IN THE MATTER OF THE APPEAL OF ANR PIPELINE COMPANY; COLORADO INTERSTATE GAS COMPANY; NORTHERN NATURAL GAS COMPANY; MAPCO FRACTIONATOR, INC.; MAPCO AMMONIA PIPELINE, INC.; MID-AMERICA PIPELINE COMPANY; and ENRON LIQUIDS PIPELINE COMPANY FROM A DECISION OF THE DIRECTOR OF PROPERTY VALUATION OF THE STATE OF KANSAS

Jan. 21, 1994

McFARLAND, Justice.

The appellants herein, with one exception, are open access common carriers that transport fuels in interstate commerce. The one exception, Mapco Fractionator, Inc., provides fractionating services to shippers of natural gas. Each is classified as a public utility for real and personal property tax purposes. Each was unsuccessful in its effort before the Director of Property Valuation (DPV) to have its property assessed on the same bases as is railroad property. Appeals were taken to the Board of Tax Appeals (BOTA), which upheld the decisions of the DPV. The appellants appeal from said BOTA order. The appellants contend the BOTA order is in violation of the uniform and equal requirement of art. 11, § 1 of the Kansas Constitution, the Equal Protection Clauses of the Kansas

and United States Constitutions, and the Commerce Clause of the United States Constitution.

The appeals were presented to BOTA on stipulated facts. Here, as there, only questions of law are presented for determination. The circumstances giving rise to the controversies herein may be stated as follows. The tax years 1990 and 1991 are involved. At all pertinent times, art. 11, § 1(b) of the Kansas Constitution provided:

> "(1) The provisions of this subsection (b) shall govern the assessment and taxation of property on and after January 1, 1989, and each year thereafter. Except as otherwise hereinafter specifically provided, the legislature shall provide for a uniform and equal basis of valuation and rate of taxation of all property subject to taxation. The provisions of this subsection (b) shall not be applicable to the taxation of motor vehicles, except as otherwise hereinafter specifically provided, mineral products, money, mortgages, notes and other evidence of debt and grain. Property shall be classified into the following classes for the purpose of assessment and assessed at the percentage of value prescribed therefor:
>
> "Class 1 shall consist of real property. Real property shall be further classified into four subclasses. Such property shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:
>
> (A) Real property used for residential purposes including multi-family residential real property 12%
>
> (B) Land devoted to agricultural use which shall be valued upon the basis of its agricultural income or agricultural productivity pursuant to section 12 of article 11 of the constitution 30%
>
> (C) Vacant lots 12%

(D) All other urban and rural real property not otherwise specifically subclassified 30%

"Class 2 shall consist of tangible personal property. Such tangible personal property shall be further classified into six subclasses, shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:

(A) Mobile homes used for residential purposes.. 12%

(B) Mineral leasehold interests 30%

(C) Public utility tangible personal property..... 30%

(D) All categories of motor vehicles not defined and specifically valued and taxed pursuant to law enacted prior to January 1, 1985..... 30%

(E) Commercial and industrial machinery and equipment which, if its economic life is seven years or more, shall be valued at its retail cost when new less seven-year straight-line depreciation, or which, if its economic life is less than seven years, shall be valued at its retail cost when new less straight-line depreciation over its economic life, except that, the value so obtained for such property, notwithstanding its economic life and as long as such property is being used, shall not be less than 20% of the retail cost when new of such property 20%

(F) All other tangible personal property not otherwise specifically classified 30%

"(2) All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, farm machinery and equipment, merchant's and manufacturer's inventories and livestock and all household goods and personal effects not used for the production of income shall be exempted from property taxation."

This article was substantially amended in 1992, effective January 1, 1993, but said amendments are not at issue herein.

Under the provisions applicable herein, real and personal property owned by public utilities was to be assessed at 30 percent. The appellants and railroads are public utilities. K.S.A. 79-5a01.

In 1976, Congress enacted the Railroad Revitalization & Regulatory Reform Act of 1976 (Pub.L. 94-210, 90 Stat. 31, 54-5 [codified at 49 U.S.C. § 11503 (1988)]). The Act, commonly referred to as the 4-R Act, provides, in pertinent part:

"(a) In this section—

(1) 'assessment' means valuation for a property tax levied by a taxing district.

(2) 'assessment jurisdiction' means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) 'rail transportation property' means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 U.S.C. §§ 10501 *et seq.*].

(4) 'commercial and industrial property' means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

"(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 U.S.C. §§ 10501 *et seq.*].

"(c) Notwithstanding section 1341 of title 28 [28 U.S.C. § 1341] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined

to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district."

The purpose of the 4-R Act was to prohibit discriminatory taxation of railroad real and personal property by state and local property tax laws and to promote the revitalization of the railway system nationwide. See *Clinchfield R. Co. v. Lynch,* 784 F.2d 545, 551 (4th Cir.1986); *State of Ariz. v. Atchison, T. & S.F.R. Co.,* 656 F.2d 398, 400 (9th Cir.1981)

The 4-R Act spawned years of federal litigation wherein railroads sought to utilize it to reduce their real and personal property taxes in Kansas. See, *e.g., Atchison, Topeka & S.F. Ry. Co. v. Lennen,* 640 F.2d 255 (10th Cir. 1981); *Atchison, Topeka and Santa Fe Ry. Co. v. Lennen,* 552 F.Supp. 1031 (D.Kan.1982), *aff'd in part, rev'd in part* 732 F.2d 1495 (10th Cir.1984); *Atchison, T. & S.F. Ry. Co. v. Lennen,* 531 F.Supp. 220 (D.Kan. 1981).

That litigation ended in 1989 with the entry of consent decrees. The parties rely on the decree entered on August 11, 1989, in *Burlington Northern Railroad Company v.*

Rolfs, D.Kan., No. 89-4124-R, filed August 11, 1989. The effect of this decree was to fix the railroads' assessment rate for real property at 25 percent for 1990 and 22.3 percent for 1991. The parties have stipulated that 80 percent of the railroads' personal property was exempted from taxation with the balance of 20 percent to be assessed at 30 percent of the value. Like BOTA, we are at a loss from the record to see the basis for this exemption, but accept the parties' stipulation for the purposes of this appeal.

The appellants' basic position is quite simple and direct. They believe they are entitled to the same deal the railroads received for the tax years 1990 and 1991 as a result of the consent decree. There is no challenge herein to any portion of the decree. The appellants are seeking only to be taxed on the same basis as to their real and personal property for the years in dispute in the respective cases.

UNIFORM AND EQUAL

For their first issue, appellants contend that the disparate treatment between pipelines and railroads violates the Kansas constitutional mandate of uniform and equal treatment among members of the same subclass. Under art. 11, § 1(b), pipeline and railroad real estate are in subclass (D) to be assessed on the basis of 30 percent of value, and their tangible personal property is in subclass (C), also to be assessed at 30 percent of value.

For many years art. 11, § 1 provided that all property was to be assessed on a uniform basis with exceptions thereto being limited to particular types of property, regardless of ownership.

Under this system, for example, typewriters of the same make and model, purchased the same day, should be assessed at the general rate regardless of the nature of the usage thereof by the respective owner. It would matter not whether a particular typewriter was owned by a public

utility, a manufacturer of goods, or a grocery store. The philosophy underlying this concept was set forth in *Wheeler v. Weightman,* 96 Kan. 50, 58, 149 Pac. 977 (1915), as follows:

> "The essentials [of the Uniform and Equal Clause] are that each man in city, county, and state is interested in maintaining the state and local governments. The protection which they afford and the duty to maintain them are reciprocal. The burden of supporting them should be borne equally by all, and this equality consists in each one contributing in proportion to the amount of his property. To this end all property in the state must be listed and valued for the purpose of taxation, the rate of assessment and taxation to be uniform and equal throughout the jurisdiction levying the tax."

Under the 1985 amendments to art. 11, § 1, real estate was essentially classified by usage, and personal property was essentially classified by ownership. This basic alteration in the scheme of taxation must be borne in mind when reading our earlier cases.

The appellants contend that one of these cases, *Voran v. Wright,* 129 Kan. 601, 284 Pac. 807 (1930), is dispositive of this issue. We do not agree. The DPV and the *amici* herein contend *Voran* is inapplicable. Their reasons vary. The pertinent portion of art. 11, § 1 involved in *Voran* was as follows:

> "The legislature shall provide for a uniform and equal rate of assessment and taxation, *except that mineral products, money, mortgages, notes and other evidence of debt may be classified and taxed uniformly as to class as the legislature shall provide.* All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars

for each family, shall be exempted from taxation." (Emphasis in original.) 129 Kan. at 606, 284 P. 807.

Of this provision the *Voran* court stated:

"Whatever may have been proper as to classification of owners under this section before the amendment, there can no longer be any question in that regard. A classification as to owners is not now permissible. The only classification authorized or tolerated by this constitutional provision is that of property, and it makes no difference by whom it may be owned, whether by individual, merchant, manufacturer, banking institution or other corporation. Every classification is now limited to property, and only four kinds of property, viz., mineral products, money, mortgages, notes and other evidence of debt." 129 Kan. at 606-07, 284 P. 807.

The underlying problem in *Voran* was the taxation of the property of national banks. Of this the *Voran* court stated:

"National banks, being governmental agencies, would not be subject to a tax imposed by the state, and the only way to reach the property of national banks was by an indirect method sanctioned by this act of congress. It is argued that the state could have taxed the shares of stock in national banks without the permission thus granted by congress, but it has been granted with requirements and restrictions, and this state and all others have attempted to comply with the restrictions and terms imposed rather than try to accomplish the same in disregard of such consent, even if it could have been so done.

"Instead of taxing the national bank on the valuation of its property, the act authorizes the state to tax its shares of stock against the holders thereof, but the act expressly prescribes that such tax shall not be at a greater rate than is assessed upon other

moneyed capital in the hands of individual citizens of the state coming into competition with the business of national banks. This act is known as section 5219 of the Revised Statutes of the United States, which was amended in 1923 and again in 1926, and is in part as follows:

'Sec. 5219. The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

'1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of others, except as hereinafter provided in subdivision (c) of this clause.

'(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks: *Provided*, That bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.'" 120 Kan. at 605-06, 284 P. 807.

In the effort to comply with the federal law and thus reach national bank property for taxation purposes, the Kansas Legislature enacted certain statutes. A federal court held that shareowners of national banks could not

be subjected to the general ad valorem tax rate under section 5219. This left state bank shareowners being assessed at the general rate and national bank shareowners being assessed on the lower intangible tax rate. The *Voran* court, applying the constitutional provisions in effect at the time, held certain portions of one of the statutes unconstitutional and thereby permitted the plaintiff owners of state bank shares to be taxed at the intangibles tax rate, as were their counterparts owning national bank shares.

Voran is distinguishable in a number of respects from the situation before us. National bank property at the time in *Voran* was not taxable except by compliance with the federal act. Art. 11, § 1, in the form in effect in *Voran*, did not contain a classification system. There were no exceptions to the general rate other than for mineral products, money, mortgages, notes, and other evidence of debt which the legislature could classify and take uniformly throughout the particular class. Shares of stock were in none of these exceptions. The present form of art. 11, § 1 classifies real and personal property based in part upon usage or ownership.

The 4-R Act, as it applies to Kansas and as reflected in the consent decree, simply required that railroad property be assessed at no higher rate than commercial or industrial property. Railroad property was thereby made an exception to subclasses to which public utility property was assigned. This exception was amended into art. 11, § 1 in 1992, where the public utility real property subclass and the commercial and industrial subclasses provide:

> "(5) Public utility real property, except railroad real property which shall be assessed at the average rate that all other commercial and industrial property is assessed 33%
>
> "(6) Real property used for commercial and industrial purposes and buildings and other

improvements located upon land devoted to agricultural use ..... 25%"

Likewise in the 1992 amendment, personal property subclasses for public utility and commercial and industrial property provide:

"(3) Public utility tangible personal property included inventories thereof, except railroad personal property including inventories thereof, which shall be assessed at the average rate all other commercial and industrial property is assessed 33%

. . . .

"(5) Commercial and industrial machinery and equipment which, if its economic life is seven years or more, shall be valued at its retail cost when new less seven-year straight-line depreciation, or which, if its economic life is less than seven years, shall be valued at its retail cost when new less straight-line depreciation over its economic life, except that, the value so obtained for such property, notwithstanding its economic life and as long as such property is being used, shall not be less than 20% of the retail cost when new of such property ..... 25%"

We agree with appellants that a "uniform and equal" requirement has been constant in art. 11, § 1, but there has been a pertinent shift in the application of the requirement. In *Voran*, art. 11, § 1 essentially had all property in one grouping with certain specific types of property being excepted therefrom for classification, if the legislature desired. The *legislature was charged with providing a uniform and equal rate* of assessment and taxation for the general group and to tax the excepted types of property uniformly within their respective class. In contrast, the form of art. 11, § 1 before us *classifies all real and personal property and fixes the assessment*

rate for each subclass. The legislature is charged with providing only a *uniform and equal basis for valuation and rate of taxation.* Thus, rate of assessment for particular property is now contained within the article and is not a matter for the legislature to determine on a uniform and equal basis. Under the article, public utility property is assessed at 30 percent.

This distinction has much to do with the result reached in *Voran.* Bank shares, not being in an exception, would ordinarily be in the general group. To bring national bank shares into the tax base, the legislature enacted legislation which ran afoul of federal law and resulted, as a result of a federal court decision, in state bank shares being taxed on a different basis than federal bank shares. Portions of the statutes which had led to this result were held violative of the legislature's duty to provide a uniform and equal rate of assessment and taxation.

In the case before us, the 4-R Act placed limitations on state taxation of railroad property. Railroad property had to be treated the same as "other commercial and industrial property." There can be little doubt that this is a preemption. If it is not a preemption, the 4-R Act is just a piece of paper suggesting railroads should be treated like other commercial and industrial property and the enforcement section thereof is surplusage. Clearly, that was not the Congressional intent in enacting the 4-R Act.

In *Goben v. Barry,* 237 Kan. 822, Syl. ¶ 3, 703 P.2d 1378 (1985), a preemption case, we held:

> "In making a determination of federal preemption, a court should examine those concerns emphasized by Congress in enacting the legislation. State law should be preempted only to the extent necessary to protect achievement of the purposes of the federal act in question."

The purpose of the 4-R Act was to benefit and revitalize railroads. The brief of the Department of Revenue

states pipeline companies attempted unsuccessfully to obtain like federal legislation in their favor. The statement is not disputed. In any event, there is absolutely no indication in the record that Congress intended, by the enactment of 4-R, to preempt or affect how pipeline property was assessed or taxed by the states. Limiting the presumption of the 4-R Act to its purposes and application results in minimal interference with the classification system provided by art. 11, § 1.

The appellants argue that we should adopt the rationale of the Nebraska Supreme Court in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989). Nebraska held in favor of the pipelines in their quest to be afforded the same favorable treatment as railroads under the 4-R Act. We decline to do so. The Nebraska Constitution does not have property classifications and is more akin to art. 11, § 1 in the form applicable in *Voran*. We do not find the Nebraska rationale persuasive on this issue.

In *Federal Exp. Corp. v. Tenn. State Bd.*, 717 S.W.2d 873 (Tenn.1986), the Tennessee Supreme Court rejected a similar challenge on "uniform and equal" grounds. This case will be discussed in more detail in the next issue.

We conclude that the BOTA order refusing to afford the appellants their requested relief of having their property assessed on the same basis as railroads is not violative of the uniform and equal provision of art. 11, § 1 of the Kansas Constitution.

EQUAL PROTECTION

For their second issue, appellants contend the BOTA order is violative of the Kansas and United States Constitutions' Equal Protection Clauses.

The 14th Amendment of the United States Constitution provides that no state can make or enforce a law which shall deny to any person within its jurisdiction the equal

protection of the laws. Section 1 of the Bill of Rights of the Kansas Constitution provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Appellants do not argue the Kansas Constitution grants them any greater rights herein than does the United States Constitution. In the following discussion, we will refer only to the United States Constitution, but such discussion should be considered as being equally applicable to the Kansas Constitution argument.

Similar arguments were raised in two cases in other jurisdictions and rejected.

In *State v. Colonial Pipeline Co.*, 471 So.2d 408 (Ala. Civ.App.1984), the Alabama Court of Civil Appeals considered an oil pipeline's challenge to the assessment of its property at the public utility rate, which was the highest rate under Alabama's classification system. Colonial contended, *inter alia*, that assessment of railroad property which was in the same classification as the pipeline at a lesser rate by virtue of the 4-R Act was violative of the Equal Protection Clause of the United States Constitution. The Alabama court stated:

> "If there may be some discrimination against Colonial, it is not arbitrary or unreasonable. Until the state was specifically forbidden to tax the property of railroads at a higher assesment ratio than other commercial and industrial property by Congress in 49 U.S.C.A. § 11503, it classified the property of railroads as Class I property. Moreover, until forbidden to do so by the Circuit Court of Montgomery County in *Delta Airlines v. Department of Revenue*, Civil Action No. CV-80-116-G, the Department classified the property of airlines as utilities and taxed them as Class I property. The Tax Equity & Fiscal Responsibility Act of 1982, § 532 amending 49 U.S.C. § 1513(b) and (d), now has the effect of forbidding the state from assessing property of air

carriers at a higher rate than other commercial and industrial property.

"Currently, the state is specifically forbidden to classify the property of motor carriers as Class I property by 49 U.S.C. § 11503a, which gives the motor carriers the same protection from high assessment rates that is afforded railroads and air carriers. Were it not for the supremacy of federal statutes over state law, airlines, trucklines and railroads, which are included in § 40-21-1, would be subject to the same Class I classification as is assigned Colonial's property. The preemption for tax purposes of those other entities does not destroy the classification by state law from which they were exempted and to which Colonial continues to belong." 471 So.2d at 412-13.

In *Federal Exp. Corp. v. Tenn. State Bd.*, 717 S.W.2d 873, a taxpayer challenged its property assessment as a public utility rather than as commercial and industrial property. While ruling that the plaintiff taxpayer was a "public utility" for ad valorem taxation, the Tennessee Supreme Court turned aside the taxpayer's equal protection argument, stating:

"Federal Express also argues that to assess its property for ad valorem tax purposes at 55% of its value, while assessing the property of railroads at the industrial and commercial rate of 30% of value, violates the Equal Protection Clause of the United States Constitution and Article II, Section 28 of the Tennessee Constitution, which requires 'the ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the state.' The legislature classified railroads as public utilities and assessed them for ad valorem tax purposes at 55% of the value of their properties. However, the Congress of the United States, by Section 306 of the Railroad Revitalization and Regulatory Reform Act

> of 1976, 49 U.S.C. § 11503 ('4-R Act'), preempted the state classification of railroads and provided that they should be taxed as industrial and commercial property are taxed. The Act, having as its purpose the revitalization of railroads, affected only that business. Thus leaving in effect the state classification of other businesses as public utilities. The assessment of each of the businesses classed as public utilities is at the same ratio to value as the assessment of Federal Express property; consequently, we find no violation of either Article II, Section 28 of the Tennessee Constitution or the Equal Protection Clause of the Federal Constitution." 717 S.W.2d at 875-76.

To buy the appellants' argument, we would have to conclude the 4-R Act, in essence, eliminated the public utility subclass of personal property and transferred the same to the commercial and industrial subclass and made a major alteration to the "all other" subclass relative to real property. Again, appellants rely on the Nebraska case of *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249, which held that taxing pipeline property on a different basis than railroad property was violative of the Equal Protection Clause as well as the uniform and equal state constitutional requirement. Again, we find the Nebraska opinion unpersuasive.

Art. 11, § 1 treats all public utility property alike. The 4-R Act affects only railroad property and preempts the classification only as to such property.

Appellants complain that BOTA did not address its equal protection arguments in the order entered. It is true the BOTA order does not specifically refer to the equal protection argument as such, but, from the language employed therein and the cases cited, it is clear such was considered.

We conclude that the BOTA order is not violative of the Equal Protection Clauses of the United States or Kansas Constitutions.

COMMERCE CLAUSE

For their third issue, appellants contend the BOTA order is violative of the Commerce Clause of the United States Constitution.

The Commerce Clause provides that the "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. State regulation that is contrary to the constitutional principle of insuring that the conduct of individual states does not work to the detriment of the nation as a whole is invalid under the dormant Commerce Clause. *Wardair Canada v. Florida Dept. of Revenue,* 477 U.S. 1, 7-8, 106 S.Ct. 2369, 2373, 91 L.Ed.2d 1 (1986).

Appellants assert that the property tax imposed by the State of Kansas upon pipeline property violates the Commerce Clause of the United States Constitution because the tax is discriminatory and unduly burdensome upon interstate commerce and violative of the third and fourth prongs of the four-prong test enumerated in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977). The four-prong test enumerated in *Complete Auto* is: (1) The tax must be applied to an activity with a substantial nexus with the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the state. 430 U.S. at 279, 97 S.Ct. at 1079.

Appellants' argument on this issue lacks focus. Much of it seems to be a broad criticism of the classification system itself without any reference to railroads or the 4-R Act. This argument is difficult to understand. Public utility real estate is in the "all other" subclass which includes

everything but residential property, agricultural land, and vacant lots. Public utility personal property has it own subclass. Pipeline operations cross only county lines are assessed at the same rate as are those crossing state lines. Kansas Const., art. 11, § 1, K.S.A. 79-5a01. Pipeline property is valued by the unit valuation method and that valuation is apportioned to Kansas based on the percentage the pipeline company's original cost in Kansas bears to the total original cost of the company. See K.S.A. 79-5a04. Thus, as required by *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981), a pipeline company's property is assessed in Kansas in proportion to the pipeline's presence in the state.

The facts herein do not support a serious challenge based upon the Commerce Clause. The appellants contend the DPV and BOTA violated the Commerce Clause by not giving them the tax advantage that the 4-R Act mandated for the railroads. The appellants and the railroads are all engaged in interstate commerce. Kansas treated them alike in its constitution and in its statutory definition of public utilities. Congress chose to favor the railroads by enactment of the 4-R Act. Congress is the source of the alleged discrimination underlying this appeal. Appellants do not challenge the 4-R Act or the consent decree thereunder. Rather, they want to ride piggyback to gain the same tax treatment in Kansas.

We find no violation of the Commerce Act in BOTA's refusal to extend the 4-R Act and the federal court order to appellants and to order appellants' property be assessed on the same basis as railroad property.

We conclude that the BOTA order is not violative of the Commerce Clause of the United States Constitution.

The order of the Board of Tax Appeals is affirmed.

ABBOTT, J., not participating.

PRAGER, C.J., Retired, assigned.

APPENDIX G

SUPREME COURT OF KANSAS

Nos. 71496, 71497, 71504 and 71505

IN THE MATTER OF THE APPEALS OF COLORADO INTERSTATE GAS COMPANY and ANR PIPELINE COMPANY FROM DECISIONS OF THE DIRECTOR OF PROPERTY VALUATION OF THE STATE OF KANSAS FOR TAX YEARS 1992 AND 1993 (CONSOLIDATED).

Sept. 29, 1995

DAVIS, Justice:

Colorado Interstate Gas Company (CIG) and ANR Pipeline Company (ANR) appeal from a dismissal by the Board of Tax Appeals (BOTA) of their claims that the State of Kansas discriminated against them in the valuation, assessment, and taxation of their real and personal property for the years 1992 and 1993. They contend that the failure of the Director of Property Valuation (DPV) to tax them in the same manner as other utilities, certain named railroads, violated the uniform and equal requirement of Art. 11, § 1 of the Kansas Constitution, the Equal Protection Clauses of the Kansas and United States Constitutions, and the Commerce Clause of the United States Constitution, and that BOTA erred in dismissing their claims without a hearing. We affirm in part, reverse in part, and remand for further hearing.

CIG and ANR contend that BOTA's dismissal of their tax appeals for 1992 and 1993 without a hearing denied them due process of law. They argue that BOTA erred in

not granting them a due process hearing upon the mistaken belief the 1992 and 1993 appeals were controlled by *In re Tax Appeal of ANR Pipeline Co.*, 254 Kan. 534, 866 P.2d 1060, *cert. denied* —— U.S. ——, 115 S.Ct. 296, 130 L.Ed.2d 209 (1994). They contend that their tax appeals raise issues not addressed in *ANR Pipeline* and that *ANR Pipeline* has been effectively overruled by the decision of the United States Supreme Court in *Oregon Rev. Dept. v. ACF Industries,* 510 U.S. ——, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994).

CIG and ANR were party plaintiffs in the *ANR Pipeline* case. They, together with other utilities, appealed from a BOTA order affirming the decisions of the DPV for the tax years 1990 and 1991. The argument advanced in *ANR Pipeline* and rejected by this court was that the pipeline utilities were entitled to the same assessment rate given to certain railroads pursuant to a consent decree entered in *Burlington Northern Railroad Company v. Rolfs,* D.Kan., No. 89-4124-R, filed August 11, 1989. As noted in *ANR Pipeline:*

> "The effect of [the consent] decree was to fix the railroads' assessment rate for real property at 25 percent for 1990 and 22.3 percent for 1991. The parties have stipulated that 80 percent of the railroads' personal property tax was exempted from taxation with the balance of 20 percent to be assessed at 30 percent of the value. Like BOTA, we are at a loss from the record to see the basis for this exemption, but accept the parties 'stipulation for the purposes of this appeal." 245 Kan. at 538.

The assessment rate for the real and personal property of public utilities in Kansas during 1990 and 1991 was closer to a 30% rate. Under the terms of the consent decree, the railroads were treated differently than other public utilities and were being taxed at a rate that the State taxed commercial or industrial property. The ques-

tion we faced and resolved in *ANR Pipeline* was whether the Railroad Revitalization & Regulatory Reform Act of 1976 (Pub.L. 94-210, 90 Stat. 31, 54-5 [codified at 49 U.S.C. § 11503 (1988)], commonly referred to as the 4-R Act, preempted Kansas law which assessed railroad property at a rate greater than commercial or industrial property. We held:

> "The 4-R Act, as it applies to Kansas and as reflected in the consent decree, simply required that railroad property be assessed at no higher rate than commercial or industrial property. Railroad property was thereby made an exception to subclasses to which public utility property was assigned. . . .
>
> . . . .
>
> "[T]he 4-R Act placed limitations on state taxation of railroad property. Railroad property had to be treated the same as 'other commercial and industrial property.' There can be little doubt that this is a preemption. If it is not a preemption, the 4-R Act is just a piece of paper suggesting railroads should be treated like other commercial and industrial property and the enforcement section thereof is surplusage. Clearly, that was not the Congressional intent in enacting the 4-R Act." 254 Kan. at 541-43, 866 P.2d 1060.

Three days after this court decided *ANR Pipeline*, the United States Supreme Court decided the case of *Oregon Rev. Dept. v. ACF Industries*, 510 U.S. ——, 114 S.Ct. 843, 127 L.Ed.2d 165. The State of Oregon imposed an ad valorem tax upon all real and personal property within the jurisdiction except property granted an express exemption and subjected all nonexempt property to assessment and taxation in equal and ratable proportion. Oregon also exempted various property classes, including some classes of business personal property. Several companies leased railroad cars and shippers and under Oregon tax law, these cars were considered nonexempt

property. The companies concerned brought suit under the 4-R Act against Oregon, claiming that the state's property tax violated § 11503(b)(4) of the 4-R Act by exempting certain classes of commercial and industrial property while taxing railroad cars in full. The Court concluded "that § 11503, which expresses Congress' resolution of the matter, does not limit the States' discretion to exempt nonrailroad property, but not railroad property, from ad valorem property taxes of general application." 510 U.S. at ——, 114 S.Ct. at 852, 127 L.Ed.2d at 178. The Court further concluded that a state may grant exemptions from a generally applicable ad valorem property tax without exposing the taxation of railroad property to invalidation under subsection (b)(4). 510 U.S. at ——, 114 S.Ct. at 848, 127 L.Ed.2d at 173.

While the litigation in *ANR Pipeline* was being conducted before this court, and prior to the time *ACF Industries* was decided by the United States Supreme Court, the events which provide the basis for this appeal occurred. In a continuation of the negotiated settlement, the DPV and the named railroads entered into consent decrees regarding the 1992 and 1993 tax years. See *Burlington Northern Railroad Company v. Beshears*, D. Kan., No. 92-4120-C, filed June 1, 1992; *Burlington Northern Railroad Company v. Parrish*, D.Kan., No. 93-4119-DES, filed May 21, 1993. CIG and ANR filed notices of appeal from the DPV to BOTA for the tax years 1992 and 1993. The 1922 notices of appeal reference the notices of appeal in *ANR Pipeline* and state:

> "1. Taxpayer was assessed and taxed differently than other entities meeting the definition of a public utility, as defined in K.S.A. § 79-5a01, in violation of the Constitutions of the United States and of the State of Kansas which provide for fair, equal and uniform treatment under the laws.
>
> "2. Taxpayer was assessed and taxed differently than other entities meeting the definition of a public

utility in violation of the United States Constitution which prohibits the creation of undue burdens on interstate commerce.

"3. Taxpayer does not accept the assesed value as stated in the referenced decision.

"WHEREFORE, Taxpayer requests the Board to coduct a hearing pursuant to K.S.A. § 74-2438, to find that Taxpayer is entitled to be assessed uniformly and equally; to adjust its Kansas assessed value to reflect fair, uniform, and equal treatment; to adjust its Kansas assessed value in order to avoid undue burdens on interstate commerce; to recertify or order a recertification of Taxpayer's Kansas Assessed Value; or, in the event that recertification is untimely, to order a refund calculated accordingly."

The 1993 notices of appeal simply state that:

"[CIG and ANR give] notice of appeal of the decision or final action of the Director of Property Valuation dated June 11, 1993 (DPV ID No. G902) to the extent that Taxpayer was assessed, valued and taxed differently than (1) other entities meeting the definition of a public utility, as defined in K.S.A. 79-5a01; and (2) entities defined as commercial and industrial which is in violation of the constitutions of the United States and of the State of Kansas.

"WHEREFORE, Taxpayer requests the Board to conduct a hearing pursuant to K.S.A. § 74-2438, to find that Taxpayer is entitled to be assessed uniformly and equally; to adjust its Kansas assessed value to reflect fair, uniform, and equal treatment among members of the same subclass; to adjust its Kansas assessed value to reflect fair and equal treatment among similarly situated taxpayers; to adjust its Kansas assessed value in order to avoid undue burdens on interstate commerce; to recertify or order a recertification of Taxpayer's Kansas assesed value;

or, in the event that recertification is untimely, to order a refund calculated accordingly."

For the 1992 tax year only, the parties stipulated to a set of facts. On February 7, 1994, without holding a hearing on any of the appeals, BOTA filed its decision in all the matters. BOTA found that appellants were asking to be afforded the same favorable tax treatment as railroads and that this issue had already been decided in *ANR Pipeline*. As a result, BOTA denied appellants' appeals.

Appellants filed motions for reconsideration for the 1992 tax year, arguing that *ANR Pipeline* was not a final case, as a motion for rehearing had been filed. Appellants also argued that even if the Kansas Supreme Court denied rehearing, a petition for writ of *certiorari* would be filed in the United States Supreme Court and the decision should be stayed until such a time as that had been decided. Appellants further contended that *AFC Industries* had effectively overruled *ANR Pipeline* and that BOTA should reopen the case in light of that ruling. It should be noted that this court denied appellants' motions for reconsideration in *ANR Pipeline* and the United States Supreme Court denied appellants' petition for writ of *certiorari*.

Appellants also filed motions for reconsideration for the 1993 tax year. In these motions, appellants alleged that BOTA had failed to recognize the other issues they were raising that had nothing to do with the decision in *ANR Pipeline*, specifically, questions concerning a 1992 amendment to the Kansas Constitution as well as the assessment and taxation figures for 1993. The motions also recited issues concerning the purported conflict between *ANR Pipeline* and *ACF Industries*.

In rulings dated March 11, 1994, BOTA stated that *ACF Industries* did not overrule *ANR Pipeline* and that appellants had not proffered any new evidence which

would warrant an evidentiary hearing on the matter. Accordingly, BOTA denied appellants' motions for reconsideration in all cases.

Appellants contend that *ACF Industries* overruled in part our decision in *ANR Pipeline* and that this fact must be considered by BOTA for the tax years 1992 and 1993. Specifically, appellants argue that the United States Supreme Court in *ACF Industries* virtually removed tax *exemptions* granted by states from consideration under the 4-R Act. Since the consent decrees granted the named railroads an 80% tax exemption of their Kansas personalty for the years 1992 and 1993 with the expressed intent to "eliminate ad valorem tax discrimination against plaintiffs' personalty in the State of Kansas" in accord with the provisions of the 4-R Act, and since the same 80% exemption was not granted to appellants herein, also public utilities, appellants argue that the difference in treatment discriminated against them. Appellants contend that this issue was never addresed and a hearing before BOTA must be granted to assess the impact of *ACF Industries* on *ANR Pipeline*.

ANR Pipeline involved a question of federal preemption under the 4-R Act. *ANR Pipeline* did not directly address the question of exemptions. The issue, as framed by the parties under the stipulated facts, did not involve the question of whether the 4-R Act applied to an exemption granted under state law. Instead, *ANR Pipeline* addressed the broader question of whether the 4-R Act preempted the state statutory taxation scheme. None of the parties to *ANR Pipeline* addressed such an issue. *ACF Industries*, however, dealt with the precise issue of whether the 4-R Act applied to exemptions from ad valorem taxes granted under state law.

Our holding in *ANR Pipeline*, because it did not directly address the issue of exemptions, does not provide a basis for the BOTA decision to deny a hearing for the tax years 1992 and 1993 upon the issue of the 80%

exemption. BOTA mistakenly applied *ANR Pipeline* to the exemption issue raised by appellants for the 1992 and 1993 tax years. However, this mistake does not require a remand because the 80% exemptions for 1992 and 1933 were the direct result of a negotiated settlement between litigants in a protracted complex civil action. We conclude, consistent with our analysis below, that the basis for such exemptions was not discriminatory.

The contention that the consent decrees are without any basis in federal law and, therefore, result in discriminatory treatment of CIG and ANR, fails to take into consideration the nature of the consent decrees. In the consent decrees for the years in question, the railroads and the DPV agreed that the named railroads would be granted an 80% exemption for their personal property taxes. This provision was incorporated at the insistence of the named railroads because 80% of the total aggregate commercial and industrial personal property in the state was tax exempt and the named railroads felt that this was discriminatory and contrary to the 4-R Act, which mandates that railroads be taxed at a rate no greater than that which applies to commercial and industrial property. As pointed out by the DPV in its brief, at the time the 1992 and 1993 consent decrees were entered into, every court that had addressed the issue had held that state property tax exemptions given to locally assesed commercial and industrial personal property, and not given to state assessed railroads, violated subsection (b)(4) of the 4-R Act, However, under the terms of the consent decrees, the remaining railroad personal property was taxed at the public utility rate of approximately 30% instead of the commercial and industrial rate of 20%. The consent decrees were negotiated settlements between the parties.

We may not ignore the protracted federal litigation between the named railroads and the State through the DPV. We acknowledge that the consent decrees represent negotiated settlements based upon the then-existing

state law as well as the strengths and weaknesses of the parties to the litigation. While the named railroads were treated differently than other public utilities in Kansas, this difference in treatment was not based upon a purposely designed discriminatory scheme but rather upon the numerous factors involved in the settlement of complex, difficult and expensive litigation.

The consent decrees applied only to the parties in the litigation. The settlement was arrived at through an assessment of a myriad of options available to the parties. While the granting of the 80% personal property tax exemption may have been based upon the belief that the 4-R Act required it, a belief that may be false in light of the United States Supreme Court's decision in *ACF Industries*, the settlement represents a cost-benefit analysis of continued litigation through federal trial and appellate courts, including possibly, an appeal to the United States Supreme Court and the collection of personal and real property taxes without continued litigation. The settlement of a lawsuit is a complex process, one that the law encourages and one that is dependent upon many factors including the skill and knowledge of the attorneys involved, the present state of the law, the relative strengths and weaknesses of the parties to the litigation, and the financial abilities of the parties.

Given the number of factors involved in such a process, we are not prepared to state that the granting of the 80% personal property tax exemption to the named railroads in protracted federal litigation, as part of a negotiated settlement, discriminated against the CIG and ANR. While it is clear that the named railroads were treated differently, this treatment had nothing to do with discrimination and everything to do with the settlement of a lawsuit.

The tax discrimination issue for the years 1992 and 1993 involved a question of law with no genuine issue of material fact remaining. BOTA was able to address this issue wthout a hearing. BOTA reached the right result in

dismissing the appeals on this issue even though it based its decision upon the wrong grounds, *viz., ANR Pipeline.* Under these circumstances, we are able to affirm under the principle that a decision which reaches the right result will be upheld even though the tribunal may have relied upon the wrong ground or assigned erroneous reasons for its decision. See *Bank of Kansas v. Davison*, 253 Kan. 780, 792, 861 P.2d 806 (1993).

Appellants, nevertheless, contend that BOTA's refusal to grant a hearing for either the 1992 or 1993 tax appeals denied them due process of law. Appeals to BOTA are governed by K.S.A. 74-2438, which provides that "[u]pon receipt of a timely appeal, the board shall conduct a hearing in accordance with the provisions of the Kansas administrative procedure act. The hearing before the board shall be a de novo hearing unless the parties agree to submit the case on the record made before the director." The Kansas Administrative Procedure Act sets forth the rules of the formal hearing. It notes that parties may have a prehearing conference and shall, at appropriate stages of the proceeding, give all parties a full opportunity to file pleadings, motions, and objections. K.S.A. 77-516; K.S.A. 77-519. Regarding the hearing itself, K.S.A. 77-523(b) states:

> "To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order."

Under these statutes, BOTA is required to hold a hearing. K.S.A. 74-2438 uses the word "shall," which indicates that a hearing is mandatory. However, K.S.A. 74-2438 states that the hearing is de novo "unless the parties agree to submit the case on the record made before the

director." As a result, parties may waive their right to a de novo hearing by submitting the case to BOTA on the record. Moreover, where the parties to a BOTA appeal have entered into a stipulation concerning all material fact with only questions of law remaining, or where the matters on appeal are questions of law with no genuine material fact questions remaining, BOTA may dispose of the appeal on the record without a hearing.

The sole question raised by appellants in their 1992 appeals was their claim that they were being treated differently for tax purposes than other public utility railroads. Their 1992 appeals referenced their 1990 and 1991 appeals finally disposed of by this court in *ANR Pipeline*. This tax discrimination claim was the only issue raised by appellants in their 1992 appeals and was one of the issues raised in the 1993 appeals. This issue involved a question of law, with no genuine material fact issue remaining. We affirm BOTA's dismissal of this issue on appeal without hearing, even though BOTA assigned erroneous reasons for its decision, because the right result was reached.

In addition to the tax discrimination issue, the notices of appeal for 1993 raise other issues which require us to remand to BOTA for further proceedings. The 1993 notices do not reference the earlier tax appeals. The parties did not enter into a stipulation of fact for 1993 as they had done for 1992. The 1993 appeals state only that appellants appeal the decision of the DPV to the extent that they were assessed differently than other public utilities or other entities defined as commercial and industrial businesses. This language is broad enough to encompass their claims that the 1992 Kansas constitutional amendment taxing pipeline inventories violates equal protection, that ad valorem taxation of the intangible personal property of utilities is discriminatory, and that the DPV used an erroneous allocation method that discriminated against them.

In the event of a remand, appellants ask us to resolve two issues which they claim will expedite further proceedings before BOTA. The first issue concerns the effect the United States Supreme Court's decision in *ACF Industries* has on our decision in *ANR Pipeline*. We have addressed this issue above. Appellants also ask this court to determine whether intangible personal property is properly subject to ad valorem tax in Kansas. This issue was never addressed by BOTA because appellants' 1993 appeals were dismissed without a hearing.

We decline to reach this issue. BOTA is an administrative tribunal established by law to determine controversies relating to assessments of property for ad valorem tax purposes. See *Northern Natural Gas Co. v. Dwyer,* 208 Kan. 337, 342, 492 P.2d 147 (1971), *cert. denied* 406 U.S. 967, 92 S.Ct. 2408, 32 L.Ed.2d 665 (1972). This issue is within BOTA's area of expertise, and BOTA should be given a chance to address it. BOTA's decision denying appellants' 1992 tax appeals is affirmed. That part of BOTA's decision regarding the disparate tax treatment for the year 1993 is also affirmed. However, the remaining questions raised by appellants for the 1993 tax year are remanded for further proceedings before BOTA.

Affirmed in part, reversed in part, and remanded.

ABBOTT and LARSON, JJ., not participating.

MARVIN W. MEYER, Judge Retired, assigned.

APPENDIX H

DISTRICT COURT OF KANSAS
THIRD JUDICIAL DISTRICT
Shawnee County, Kansas

May 14, 1996

William E. Waters, Esq.
Division of Property Valuation
Department of Revenue
915 S.W. Harrison Street
Topeka, KS 66612-1585

Richard D. Greene, Esq.
MORRIS, LAING, EVANS, BROCK
& KENNEDY, CHARTERED
Fourth Floor, 200 West Douglas
Wichita, KS 67202

Re: Colorado Interstate Gas Company v.
State Department of Revenue, Case No. 92-CV-1052

MEMORANDUM DECISION

Dear Counsel:

The defendants have filed a Motion for Summary Judgment on February 27, 1996 in the captioned matter. The plaintiffs have not responded to the Motion for Summary Judgment but have filed a Motion to Stay Proceedings on May 6, 1996 pending a final judgment in a related federal action. The defendants object to a further stay of proceedings.

After reviewing the defendants' Motion for Summary Judgment and supporting memoranda, the Court adopts as its findings of fact the matters stated in paragraphs 1 through 19 of the defendants' Statement of Uncontro-

verted Fact in accordance with Supreme Court Rule 141. The Court finds that the issues presented in this case have been determined by the Kansas Supreme Court and that the defendants are entitled to summary judgment as a matter of law. The Court further finds that a further stay of this action would be inappropriate and would serve no useful purpose. Accordingly, the defendants' Motion for Summary Judgment is sustained and plaintiffs' Motion to Stay Proceedings is overruled. Mr. Waters is requested to prepare an appropriate Journal Entry in accordance with the foregoing Memorandum Decision.

Very truly yours,

/s/ Fred S. Jackson
FRED S. JACKSON
District Judge

APPENDIX I

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

No. 77,225

COLORADO INTERSTATE GAS COMPANY
and ANR PIPELINE COMPANY,
Appellants,

v.

MARK BESHEARS,
Secretary of Revenue, *et al.*,
Appellees.

MEMORANDUM OPINION

Appeal from Shawnee District Court; FRED S. JACKSON, judge. Opinion filed February 13, 1998. Reversed and remanded.

ELLIOTT, J.: Colorado Interstate Gas Company and ANR Pipeline Company (Taxpayers) appeal the summary judgment in favor of the Kansas Department of Revenue's Division of Property Valuation (PVD).

We reverse and remand.

It would be an understatement to say this case has a rather long and tortured history. Taxpayers are pipeline companies which transport fuels for a fee in interstate commerce. Railroads also transport fuels for a fee in interstate commerce. This case centers on Taxpayers' constitutional challenge to our state's system of taxation, which gives railroads an 80% exemption from taxation while other utility companies (Taxpayers) are denied a similar exemption.

For 1989, Taxpayers and railroads were classified the same for property tax purposes. Taxpayers' property was valued and taxed at 100%, while certain railroads had 80% of their property exempted. See *Burlington Northern R.R. v. Rolfs,* No. 89-4142-R (D. Kan. filed August 11, 1989). PVD based the preferential tax treatment on the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"). 49 U.S.C. § 11503 (1988).

Taxpayers sued in state court, arguing PVD violated federal and state equal protection clauses by its disparate treatment. The trial court dismissed on jurisdictional grounds. We reversed and remanded with instructions to determine whether Taxpayers had presented colorable constitutional claims. *Colorado Interstate Gas Co. v. Beshears,* 18 Kan. App. 2d 814, 821-22, 860 P.2d 56 (1993), *rev. denied* 256 Kan. 994 (1994).

Meanwhile, of course, Taxpayers' appeals for 1990, 1991, 1992, and 1993, were before our Supreme Court. *In re Tax Appeal of ANR Pipeline Co.,* 254 Kan. 534, 866 P.2d 1060, *cert. denied* 513 U.S. 917 (1994); *In re Tax Appeal of Colorado Interstate Gas Co.,* 258 Kan. 310, 903 P.2d 154 (1995). The present case involving 1989 was stayed pending a decision by our Supreme Court.

In both cases, our Supreme Court ruled that the 4-R Act preempted requirements of equal treatment among public utilities. 254 Kan. at 543; 258 Kan. at 312. Less than a week later, the United States Supreme Court held the 4-R Act *did not* create an entitlement to an exemption from taxes for railroads. *Department of Revenue of Ore. v. ACF Industries, Inc.,* 510 U.S. 332, 347-48, 127 L. Ed. 2d 165, 114 S. Ct. 843 (1994). In light of the United States Supreme Court decision, Taxpayers moved for reconsideration in our state supreme court. The motion was denied.

To make this history more complex, Taxpayers then sued in federal court, claiming they had never had a speedy, efficient, state court remedy since they had never been afforded a hearing on their constitutional claims. The federal district court agreed and invoked jurisdiction over Taxpayers' claims. *ANR Pipeline Co. v. LaFaver,* No. 96-1089-JTM (D. Kan. filed June 26, 1996).

Finally, after we remanded the 1989 case, PVD eventually moved for summary judgment, claiming our state supreme court's decisions were controlling. Taxpayers filed a motion to stay pending the outcome of the federal litigation. The trial court denied the motion to stay and simultaneously granted PVD's motion for summary judgment. No hearing was ever held on PVD's motion for summary judgment. We warned at the outset that this case's history was long and tortured.

When Taxpayers sued in federal court, PVD argued the federal court lacked jurisdiction to hear its claims under the Tax Injunction Act, which was designed to prevent federal courts from exercising jurisdiction over state taxation matters. 28 U.S.C. § 1341 (1994); *In re Dept. of Energy Stripper Well Exemption Lit.,* 739 F. Supp. 1449 (D. Kan. 1990), *aff'd* 968 F.2d 27 (10th Cir. 1992).

The federal district court disagreed, ruling the federal statute does *not* bar jurisdiction where state law fails to provide a plain, efficient remedy. See *Roswell v. LaSalle National Bank,* 450 U.S. 503, 67 L. Ed. 2d 464, 101 S. Ct. 1221 (1981). The federal court, in invoking jurisdiction, held that Taxpayers were denied that remedy because they had not been afforded a hearing in our state courts. *ANR Pipeline Co. v. LaFaver,* No. 96-1089-JTM. In effect, the federal district court reinforced our remand order in our earlier opinion. *Interstate Gas Co.,* 18 Kan. App. 2d at 821-22. We understand the federal litigation covers tax years 1990 through 1993.

Under the Supremacy Clause, a state court is bound by prior federal court rulings. See U.S. Const., art. 6, cl. 2; *Cooper v. Aaron*, 358 U.S. 1, 18, 3 L. Ed. 2d 5, 78 S. Ct. 1401 (1958); *In re Tax Appeal of Karsten*, 22 Kan. App. 2d 882, 886-87, 924 P.2d 1272 (1996). Further, an intervening federal court ruling is binding on state court cases which are not yet final. *Cf. Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97, Syl. ¶ 1, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993).

The present case, being on appeal after remand, was not final when the federal district court issued its ruling. The federal opinion is binding on state courts and prohibits the grant of summary judgment in favor of PVD without Taxpayers being afforded a meaningful opportunity to be heard in state court.

It is argued that Taxpayers must lose because they failed to respond to PVD's motion for summary judgment in accordance with Supreme Court Rule 141 (1997 Kan. Ct. R. Annot. 169). We disagree. Even in *McCullough v. Bethany Med. Center*, 235 Kan. 732, 736, 683 P.2d 1258 (1984), our Supreme Court observed that summary judgment should not be granted where the trial court has no way to determine what facts are or are not controverted or on what evidence the parties rely.

PVD filed its motion for summary judgment, and Taxpayers moved for an extension of time to respond. On the extended deadline, Taxpayers filed a motion to stay, arguing the pending federal litigation would be binding on the state court. The trial court denied this motion, noting the Taxpayers had not responded to the summary judgment motion. Having denied the motion to stay, the trial court, without hearing and without affording Taxpayers an opportunity to respond to the summary judgment motion, proceeded to rule on the merits of PVD's summary judgment motion. The granting of a stay, of course, halts the suit—no additional steps may be taken until the stay is lifted. See 1 Am. Jur. 2d, Actions § 75 (1994).

Where plaintiffs have been diligent in their pursuit of their case, arguments that the plaintiffs have slept on their rights by failing to file separate or additional notices have been rejected. See *Seattle Audobon Soc. v. Robertson*, 931 F.2d 590, 596 (9th Cir. 1991), *rev'd on other grounds Robertson v. Seattle Audobon Soc.*, 503 U.S. 429, 118 L. Ed. 2d 73, 112 S. Ct. 1407 (1992); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1550 (N.D. Cal. 1987).

In the present case, it seems obvious to us that Taxpayers have diligently litigated their claims, to say the least. The United States Supreme Court has clearly held the 4-R Act did *not* create an exemption for railroads. *Department of Revenue of Ore.*, 510 U.S. at 338. Taxpayers have not "slept on their rights" in the present case. Under the peculiar facts of this case, Taxpayers' motion to stay was an appropriate response to PVD's summary judgment motion pursuant to Supreme Court Rule 141. Alternatively, the motion to stay at least tolled the requirements of Supreme Court Rule 141.

We reverse and remand with directions to provide Taxpayers the remedy we originally ordered long ago: a meaningful inquiry as to whether Taxpayers have stated colorable constitutional claims.

APPENDIX J

BEFORE THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS

Docket No. 90-8930-PV and 91-6733-PV

IN THE MATTER OF THE APPEAL OF ANR PIPELINE COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 90-8927-PV and 91-6734-PV

IN THE MATTER OF THE APPEAL OF COLORADO INTERSTATE GAS COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 90-8926-PV and 91-6584-PV

IN THE MATTER OF THE APPEAL OF NORTHERN NATURAL GAS COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 91-6730-PV

IN THE MATTER OF THE APPEAL OF MAPCO FRACTIONATOR, INC., FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 91-6731-PV

IN THE MATTER OF THE APPEAL OF MAPCO AMMONIA PIPELINE, INC., FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 91-6732-PV

IN THE MATTER OF THE APPEAL OF MID-AMERICA PIPELINE COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

Docket No. 91-6585-PV

IN THE MATTER OF THE APPEAL OF ENRON LIQUIDS PIPELINE COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

ORDER

Now, on this 26th day of October, 1992, the above captioned matter comes on for consideration and decision by the Board of Tax Appeals of the State of Kansas.

The Board being fully advised in the premises, finds and concludes as follows:

1. The Board has jurisdiction of the subject matter and of the parties, a proper and timely appeal having been filed, pursuant to K.S.A. 74-2438.

2. The subject of this appeal challenges the Property Valuation Director's order certifying unit values for 1990 and 1991.

3. Each of the appellants are owners and operators of property classified as public utilities within the language of Article 11, Section 1(b), Class 1(D) (real estate) and Class 2(C) (personal property) and K.S.A. 79-5a01(a).

Findings of Fact

4. The parties entered into a series of stipulations at various times prior to the submission of these ap-

peals. The Board finds that the proposed stipulations should be accepted as true, although we also note that some of the facts stated are not material to the decision reached here. The facts will not be restated except as necessary to the discussion of the issues.

Limitation of the Issues

5. Pursuant to the Stipulations submitted, the parties restricted the ambit of this appeal to certain issues. These grounds omitted from our consideration should be noted. The parties do not contest the appraisal or determination of value for either property owned by them or property owned by railroad companies. In other words, it is not alleged that the Division of Property Valuation appraised the property in an arbitrary or capricious manner. This is relevant in that some prior determinations rested on the ground that action by the appraising officials was so arbitrary as to constitute fraud. See *Board of Johnson County Comm'rs v. Greenhaw,* 241 Kan. 119, 734 P.2d 1125 (1987); *Commercial National Bank v. Board of County Commissioners,* 201 Kan. 280, 440 P.2d 634 (1968).

6. The parties agree that Kansas Constitution, Article 11, Section 1(b) classifies both railroads and these appellants in the same sub-classification of property.

7. The parties also agreed that railroad companies are assessed in Kansas pursuant to an Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes, U.S. Dist. Ct., Kan. Docket No. 89-4124-R (Consent Decree) made part of the record by stipulation. A plain reading of the Consent Decree shows that real property owned by railroad companies is assessed at the rate of 25% for 1990 and 22.3% for 1991. Personal

property owned by railroad companies is allegedly granted the benefit of exemption for 80% of their personal property in both years. Since these are stipulations among the parties, we shall not disturb their agreements. We note, however, that no evidence shows that the unit values certified for railroad companies reveals the method or amount of value removed as a result of personal property 'exemption'.

8. Finally, the parties agree that if a reduction in the level of assessment is found to be appropriate for these appellants, the same reduction in rates of assessment should be made as was allowed by the Consent Decree for railroads. The parties reserved questions related to the validity of the reduction ordered by the Consent Decree.

Statement of the Issue

9. The question presented is narrow. Given that property owned by railroad companies is assessed as an amount less than 30%, does the United States or Kansas Constitution require that other public utility property be assessed at similar rates?

Conclusions of Law

10. Even though reserved by the parties, we find it necessary to discuss the basis stated for reduction in the level of assessment for railroad property in the Consent Decree. The Decree is purportedly authorized by the language of 49 U.S.C. Sect. 11503 (commonly known as the 4-R Act) barring discrimination against railroads under state tax statutes. The specific reductions in assessment rates are premised on the state sales ratio study and exemptions afforded non-railroad personal property. No other ground for the reduced assessment is contained in the Decree.

11. Kansas Courts have long held that reliance on the sales ratio study as a ground for reduced value or level of assessment is insufficient as a matter of law. *Northern Natural Gas Co. v. Wililams,* 208 Kan. 407, 493 P.2d 568 (1972); *cert. den.* 406 U.S. 947, 92 S.Ct. 2408, 32 L.Ed. 2d 665; *Northern Natural Gas Co. v. Dwyer,* 208 Kan. 337, 492 P.2d 147 (1971) *cert. den.* 406 U.S. 947, 92 S.Ct. 2408, 32 L.Ed. 2d 665; With respect to state taxation law, federal courts recognize that each state is free to propose and implement their own tax schemes without interference from federal authorities Thus, the discretion to release certain property from the burden of taxation is unfettered unless in violation of the U.S. Constitution. "The State's power to classify is, indeed, extremely broad, and its discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary." *Phillips Chemical Co. v. Dumas Independent school District,* 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed. 2d 384 (1959). Kansas Constitution, Article 11, Section 1 provides a specific exemption to the exact same classes of personal property listed in the Decree. No claim is made in this case that Kansas tax law violates the U.S. Constitution. The argument is that if railroads are afforded a reduced level of assessment, then other utility properties must be afforded the same treatment. In fact, the very premise of these appellants is that the Decree is an appropriate result. It is fair to say that the appellant's request is that the ambit of the Decree be expanded to include other public utility property.

12. We are not at all convinced that the Decree represents a valid application of the 4-R Act, nor that the result complies with the body of Kansas decisions. There is no evidence to examine outside of

the Decree. Nonetheless, if the underlying premise, which assumes that the Decree is valid, is false, then expansion of the doctrine merely exacerbates discrimination created by the Decree.

13. It is possible that the Decree is a fair settlement of the railroad owner's claim of discrimination. The result of that settlement is that railroad real property is assessed at less than 30% and the personal property is assessed at 20% of its contribution to the unit. In that context, we are required to examine whether the assessments of other public utility property may be assessed at 30% of fair market value.

14. It is obvious that a difference exists in the level of assessment between railroad property and other public utility property after the Decree. The appellants suggest that this difference is untenable when matched against Kansas and federal constitutional standards.

15. Appellants cite several cases for the proposition that discrimination is unconstitutional if it is the result of conscious and knowledgeable action by assessing officials. *Voran v. Wright,* 129 Kan. 601, 284 P. 807 (1930); *Von Ruden v. Miller,* 231 Kan. 1, 642 P.2d 91 (1982); *Addington v. Board of County Commissioners,* 191 Kan. 528, 382 P.2d 315 (1963).

16. Kansas Courts have long recognized that discrimination may exist, but only where a rational basis for such disparity is found. *State ex rel. Stephen v. Martin,* 227 Kan. 456, 608 P.2d 880 (1980); *Commercial National Bank v. Board of County Commissioners,* 201 Kan. 280, 440 P.2d 634 (1968); *Wesley Medical Center V. McCain,* 226 Kan. 263, 597 P.2d 1088 (1979); *Missouri Pacific Railroad Co. V. McDonald,* 207 Kan. 744,

486 P.2d 1347 (1971). Federal Courts also apply the same standard of review. *Allegheny Pittsburgh Coal Co. V. County Commissioner of Webster County, West Virginia,* 488 U.S. 336, 102 L.Ed.2d 688, 109 S.Ct. 633 (1989); *Nordlinger v. Hahn,* 60 U.S.L.W. 4563 (June, 1992). Further, the various states are granted discretion to classify property for their own taxation purposes. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973); *Ohio Oil Co. v. Conway,* 281 U.S. 146, 74 L.Ed. 775, 50 S.Ct. 310 (1930). Our task, then, is to discover whether a rational basis can be found for the difference in assessment.

17. The change in assessment for railroads is premised solely on the presence of the 4-R Act (49 U.S.C. 11503). That Act provides:

"The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

18. Pipeline and other utility companies have not been as successful in their lobbying of Congress as the railroads. The Respondent's Brief traces the legislative history of legislation similar to 4-R, but favoring pipeline or other utility operators. The end result is that railroads are unique in the field of utilities in that they have the benefit of federal legislation whereas all other utilities do not. We find that the substance of this appeal is to create, by implication, that which Congress has specifically considered and rejected.

19. Is it appropriate that the Board or even Kansas take into account the presence of the 4-R Act? We think so. The appellants argue that federal preemption is not favored and should be avoided where possible. *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). In *Goben v. Barry*, 237 Kan. 822, 703 P.2d 1378 (1985) the Kansas Court agreed: "State law should be preempted only to the extent necessary to protect achievement of the purposes of the federal act in question."

20. The 4-R Act specifically adopts a standard of discrimination unprecedented in Kansas tax law, e.g.]not to["assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property". This test is similar to the criteria reviewed by the *Williams* court and rejected as legally insufficient.

Nonetheless the Board finds that Congress is empowered to act in this area and that the legislation is entitled to some comity.

21. Does the 4-R Act or the Constitution mandate an expansive application of to public utilities? We think not. *Goben* makes clear that recognition of federal acts shall be limited to the clear import of their provisions and no more. It is also clear that Congress cannot be charged with an implied intent to afford similar treatment to other public utilities.

22. We view this case as similar to the decision in *Gordon v. Hiett,* 214 Kan. 690, 522 P.2d 942 (1974) wherein the Court determined that property assessed in excess of the statutory rate should be reduced to the level of assessment authorized by statute. The *minority* view expressed in *Gordon* would have reduced the level of assessment to the median or average assessment rate, but obviously that option was rejected by the *Gordon* Court. This Board does not ignore that the Kansas Constitution has been amended to allow classification of property among various classes since the *Gordon* decision. However, the principles of uniformity *within a class* continue to apply, in our view.

23. What we are required to enforce is uniformity within the class of utility property, both real and personal. However, the presence of federal legislation adopting a different standard for railroad property and no other utility property not only creates, but compels, a distinction to be made. We conclude that the 4-R Act creates an exception within the class of public utility property. We also conclude that the congressional distinction between railroads and other utilities is a reasonable ground for different treatment. Faced with this development in the law, Kansas Courts have

consistently maintained that differences in treatment should be minimized to the extent possible. *State ex rel. v. Dwyer,* 208 Kan. 437, 493 P.2d 1095 (1972).

24. Kansas cases plainly state that uniformity is to be enforced to the extent possible. *Von Ruden, supra.*; *Dwyer, supra.* Here, however, the 4-R Act purportedly requires departure from the 30% standard set by Kansas Constitution, Article 11, Section 1(b). We decline to authorize further departure from this standard as that was not the intent of Congress or the express direction from the legislature.

IT IS, THEREFORE, BY THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS, CONSIDERED AND ORDERED that the request for a reduced level of assessment of the appellant's property is denied.

If any party to this appeal feels aggrieved by this decision, they may file a written request for a rehearing with this Board. The written request for rehearing shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Board's order is unlawful, unreasonable, capricious, improper or unfair. A copy of the request, together with all documents submitted therewith, shall be mailed to the opposing party at the same time the request is mailed to the Board. Failure to notify the opposing party shall render any subsequent order voidable. The written request must be received by the Board within fifteen (15) days of the certification date of this order. If, at the end of fifteen days the Board has not received a written request for a rehearing, this order will become a final order from which no further appeal is available.

IT IS SO ORDERED.

[State Seal]

/s/ Jack Shriver
JACK SHRIVER
Chairman

/s/ James P. Davidson
JAMES P. DAVIDSON,
Attorney & Secretary

/s/ Maybelle Mertz
MAYBELLE MERTZ
Member

/s/
MYRA B. GROSS
Member

/s/ Fred J. Hirsch
FRED J. HIRSCH
Member

/s/ Lawrence L. Tenopir
LAWRENCE L. TENOPIR
Member

APPENDIX K

BEFORE THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS

Docket No. 92-9707-PV

IN THE MATTER OF THE APPEAL OF COLORADO INTERSTATE GAS COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

ORDER

Now, on this 7th day of February, 1994, the above captioned matter comes on for consideration and decision by the Board of Tax Appeals of the State of Kansas.

The Board being fully advised in the premises, finds and concludes as follows:

1. The Board has jurisdiction of the subject matter and of the parties, a proper and timely appeal having been filed, pursuant to K.S.A. 74-2438.
2. The subject of this appeal challenges the Director of Property Valuation's order certifying assessed values in 1992.
3. The parties entered into a stipulation regarding certain facts. The Board finds that the proposed stipulation should be accepted as true and correct.
4. The taxpayer asserts that it was assessed differently than other public utilities in violation of the United States Constitution. Specifically, the taxpayer is requesting that it be afforded the same favorable tax treatment as railroads under the Railroad Re-

vitalization & Regulatory Reform Act of 1976 (hereinafter 4-R Act).

5. The Board finds and concludes that the issue, as stated above, has been recently determined by the Kansas Supreme Court. *See, In the Matter of the Appeal of ANR Pipeline Co., et al.,* No. 69,116, slip op. (Kan. January 21, 1994). The Kansas Supreme Court ruled that the 4-R Act only applies to railroads. *Id.* The taxpayer is not a railroad and thus, is not entitled to the similar tax treatment provided by the 4-R Act. The Board, therefore, concludes that the taxpayer's request must be denied.

IT IS, THEREFORE, BY THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS, CONSIDERED AND ORDERED that for the reasons more fully stated above, the taxpayer's request for relief shall be, and is hereby, denied.

If any party to this appeal feels aggrieved by this decision, they may file a written petition for reconsideration with this Board. The written petition for reconsideration shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Board's order is unlawful, unreasonable, capricious, improper or unfair. *A copy of the petition, together with all documents submitted therewith, shall be mailed to the opposing party at the same time the petition is mailed to the Board. Failure to notify the opposing party shall render any subsequent order voidable.* The written petition must be received by the Board within fifteen (15) days of the certification date of this order. If, at the end of fifteen days the Board has not received a written petition for reconsideration, this order will become a final order from which no further appeal is available.

IT IS SO ORDERED

[State Seal]

/s/ Rita Maichel
RITA MAICHEL
Secretary

/s/ Ron Herman
RON HERMAN
Attorney

THE BOARD OF TAX APPEALS

/s/ Jack Shriver
JACK SHRIVER
Chairman

/s/
MYRA B. GROSS
Member

/s/ Fred J. Hirsch
FRED J. HIRSCH
Member

/s/ Lawrence L. Tenopir
LAWRENCE L. TENOPIR
Member

/s/ Perl M. Bass
PERL M. BASS
Member

APPENDIX L

BEFORE THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS

Docket No. 93-9737-PV

IN THE MATTER OF THE APPEAL OF COLORADO INTERSTATE GAS COMPANY, FROM AN ORDER OF THE DIRECTOR OF PROPERTY VALUATION.

ORDER

Now, on this 7th day of February, 1994, the above captioned matter comes on for consideration and decision by the Board of Tax Appeals of the State of Kansas.

The Board being fully advised in the premises, finds and concludes as follows:

1. The Board has jurisdiction of the subject matter and of the parties, a proper and timely appeal having been filed, pursuant to K.S.A. 74-2438.

2. The subject of this appeal challenges the Director of Property Valuation's order certifying assessed values in 1992.

3. The taxpayer asserts that it was assessed differently than other public utilities in violation of the United States Constitution. Specifically, the taxpayer is requesting that it be afforded the same favorable tax treatment as railroads under the Railroad Revitalization & Regulatory Reform Act of 1976 (hereinafter 4-R Act).

4. The Board finds and concludes that the issue, as stated above, has been recently determined by the

Kansas Supreme Court. *See, In the Matter of the Appeal of ANR Pipeline Co., et al.*, No. 69,116, slip op. (Kan. January 21, 1994). The Kansas Supreme Court ruled that the 4-R Act only applies to railroads. *Id.* The taxpayer is not a railroad and thus, is not entitled to the favorable tax treatment provided by the 4-R Act. The Board, therefore, concludes that the taxpayer's request must be denied.

IT IS, THEREFORE, BY THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS, CONSIDERED AND ORDERED that for the reasons more fully stated above, the taxpayer's request for relief shall be, and is hereby, denied.

If any party to this appeal feels aggrieved by this decision, they may file a written petition for reconsideration with this Board. The written petition for reconsideration shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Board's order is unlawful, unreasonable, capricious, improper or unfair. *A copy of the petition, together with all documents submitted therewith, shall be mailed to the opposing party at the same time the petition is mailed to the Board. Failure to notify the opposing party shall render any subsequent order voidable.* The written petition must be received by the Board within fifteen (15) days of the certification date of this order. If, at the end of fifteen days the Board has not received a written petition for reconsideration, this order will become a final order from which no further appeal is available.

IT IS SO ORDERED

[State Seal]

/s/ Rita Maichel
RITA MAICHEL
Secretary

/s/ Ron Herman
RON HERMAN
Attorney

THE BOARD OF TAX APPEALS

/s/ Jack Shriver
JACK SHRIVER
Chairman

/s/ Myra B. Gross
MYRA B. GROSS
Member

/s/ Fred J. Hirsch
FRED J. HIRSCH
Member

/s/ Lawrence L. Tenopir
LAWRENCE L. TENOPIR
Member

/s/ Perl M. Bass
PERL M. BASS
Member

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 96-3250 and 96-3345

ANR PIPELINE COMPANY and
COLORADO INTERSTATE GAS COMPANY,
Plaintiffs-Appellees,

vs.

JOHN D. LAFAVER, *et al.*,
Defendants-Appellants.

ORDER

Filed September 1, 1998

Before ANDERSON, EBEL and KELLY, Circuit Judges.

Appellees' petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court

PATRICK FISHER,
Clerk of Court

by /s/ [illegible]
Deputy Clerk

APPENDIX N

IN THE SUPREME COURT
OF THE STATE OF KANSAS

Karen Pauley
Colorado Interstate Gas Company
P O Box 1087
Colorado Springs CO 80944

No. 92-69116-AS

IN THE MATTER OF THE APPEAL OF ANR PIPELINE COMPANY; COLORADO INTERSTATE GAS COMPANY; NORTHERN NATURAL GAS COMPANY; MAPCO FRACTIONATOR, INC.; MAPCO AMMONIA PIPELINE, INC.; MID-AMERICA PIPELINE COMPANY; AND ENRON LIQUIDS PIPELINE COMPANY FROM A DECISION OF THE DIRECTOR OF PROPERTY VALUATION OF THE STATE OF KANSAS.

SUPREME COURT ORDER

You are hereby notified of the following action taken by the Court:

Motion for Rehearing by Colorado Interstate Pipeline, et al. Denied.

Date: 03/15/94.

CAROL G. GREEN
Clerk